

2606

No. 12393

United States
Court of Appeals
For the Ninth Circuit.

COLUMBIA LUMBER COMPANY, INC.,
a Corporation

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners
doing business under the firm name and style of Barry Arm
Camp,

Appellees,

BRUNO AGOSTINO and STANLEY SOCHA, co-partners
doing business under the firm name and style of Barry Arm
Camp,

Appellants,

vs.

COLUMBIA LUMBER COMPANY, INC.,
a Corporation,

Appellee.

Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 364)

Appeals from the United States District Court,
for the Territory of Alaska
Fourth Division.

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HERMAN H. ROSS,

BAILEY E. BELL,

Anchorage, Alaska,

Attorneys for Plaintiffs.

FAULKNER, BANFIELD & BOOCHEVER,

R. BOOCHEVER,

Juneau, Alaska,

J. L. McCARREY, JR.,

Anchorage, Alaska,

DAVIS E. RENFREW,

EDWARD V. DAVIS,

Anchorage, Alaska,

Attorneys for Defendant.

In the District Court for the Territory of Alaska,
Third Judicial Division

No. A-5207

BRUNO AGOSTINO and STANLEY SOCHA,
co-partners doing business under the firm name
and style of BARRY ARM CAMP,

Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a cor-
poration,

Defendant.

AMENDED COMPLAINT

Comes now the above-named plaintiffs and for their cause of action against the defendant, complain and allege as follows:

I.

That plaintiffs, Bruno Agostino and Stanley Socha, at all times herein mentioned were co-partners, doing business under the firm name and style of Barry Arm Camp.

II.

That plaintiffs are informed and believe, and therefore allege the facts to be true, that the defendant is now, and, at all times herein mentioned was, a corporation organized and existing under and by virtue of the Laws of the Territory of Alaska.

III.

That from some time during the year of 1944, and up to and including, on or about the 24th day of March, 1948, plaintiffs were a partnership engaged in a logging business under the firm name and style of Barry Arm Camp, on Musquito Creek in Prince William Sound, Territory of Alaska.

That prior to July 10, 1948, and on or about June 23, 1945, a timber sale agreement had been issued to the plaintiffs by the United States Department of Agriculture, by and through the Forest Service, and said plaintiffs were in possession of the lands covered thereby. That on or about July 10, 1948, an extension agreement was entered into by the above-mentioned parties, which extension agreement, extended all of the rights of the plaintiffs and their assigns up to and including December 31, 1948.

IV.

That on or about the 24th day of March, 1948, the plaintiffs entered into an oral contract with the defendant, acting by and through (their) its agents, servants, employees and officers, Kenneth D. Lambert, Ted Rowell, Tom Morgan, Ted Ray and a certain Mr. Griffit, by which plaintiff sold to, and the defendant purchased all of plaintiff's logging equipment, machinery, buildings and rights including such rights as the plaintiff's had under the timber permit and such extensions as were made; which included the right to cut two hundred and fifty

thousand (250,000) feet of timber, and agreed to pay therefor the sum of \$25,000.00, on or before the 10th day of April, 1948.

V.

That relying upon defendant's promise to pay to plaintiffs the said sum of \$25,000.00 on or about the 10th day of April, 1948, as full consideration for all of plaintiffs' said equipment, machinery, building, rights, and timber permit or rights then situate in, at, on or near, or pertinent to, said Barry Arm Camp. Plaintiffs on or about the 24th day of March, 1948, gave to, and defendant, acting through its president, Tom Morgan, its foreman and superintendent Kenneth D. Lambert and Ted Rowell and other employees whose name and title of employment are unknown to these plaintiffs but well known to the defendant, accepted full, complete and absolute possession of same; and that defendant has ever since had, and been in possession of same, except for the said 250,000 feet of timber which defendant has already cut and removed; have kept, used and operated said equipment, still has possession thereof and has failed, neglected and refused to pay the plaintiffs therefor.

Said defendant acting by and through its president and general manager, Tom Morgan, its superintendent, foreman and its other officers, agents and employees above-named fully ratified said oral contract, accepted and now retain the benefits therefrom, became bound thereby, and is now estopped to deny the liability thereby created and is obligated

and bound to pay according to the terms thereof, the sum of \$25,000.00.

VI.

That, although plaintiffs have frequently made demand of defendant for the payment to them of the said sum of \$25,000.00 as the purchase price agreed to between plaintiffs and defendant for said equipment, machinery, buildings and all rights that they had under the timber permit, no part of same has been paid by defendant to the plaintiffs, and that there is still due, owing and unpaid by defendant to plaintiffs the said sum of \$25,000.00, together with interest thereon at the rate of six per cent (6%) per annum from the 10th day of April, 1948, all of said sum and interest thereon being payable in lawful money of the United States of America.

VII.

Plaintiffs further allege, that they are entitled to recover from the defendant the further sum of \$5,000.00 as a reasonable attorney's fees for the prosecution of this action, and that the same be taxed as a part of the costs.

For a Second and Separate Cause of Action,

Plaintiffs Allege:

I.

That the plaintiffs incorporate herein and by reference make the same a part of this their Second Cause of Action, all of the allegations in paragraphs numbered I, II, III and VII of their First Cause

of Action herein above set forth, and in addition thereto allege

II.

That plaintiffs offered to sell all of their logging equipment, machinery, buildings and all rights that they had under their timber permit and extensions thereto and to give defendant possession thereof for the sum of \$25,000.00, and the defendant acting by and through its agents, officers and employees named in their First Cause of Action, agreed to buy same, and to pay plaintiffs the sum of \$25,000.00 therefor on or before April 10, 1948.

That the plaintiffs did sell and give possession thereof to the defendant, and the defendant did buy same and did take and retain possession thereof, and still retains possession thereof; is now justly and lawfully indebted to the plaintiff in the sum of \$25,000.00 together with interest thereon at the rate of six (6%) per cent per annum from April 10, 1948, and by its conduct is estopped to deny said liability in said sum, or any part thereof.

For a Third and Separate Cause of Action,

Plaintiffs Allege

Comes now the plaintiffs above-named and for their third and separate cause of action against against the above-named defendant, allege and state.

I.

That the plaintiffs incorporate herein and by reference make the same a part of this their Third Cause of Action, all of the allegations set forth in

paragraphs I, II, III and VII of their First Cause of Action herein above set forth, and in addition thereto allege and state. That on or about the 24th day of March, 1948, the defendant became indebted to the plaintiffs and became obligated and bound to pay them on or before the 10th day of April, 1948, the sum of twenty-five thousand dollars (\$25,000.00) on account of logging equipment, machinery, buildings and rights under plaintiffs timber permit sold and delivered to the defendant by the plaintiffs at the defendant's request in the Third Judicial Division of the Territory of Alaska; which property the defendant accepted and now retains and have failed, neglected and refused to pay the same or any part thereof; that there is now due the plaintiffs from the defendant the sum of \$25,000.00 together with interest thereon at the rate of six per cent (6%) per annum from April 10, 1948.

Wherefore, plaintiffs pray for judgment against defendant for the sum of Twenty-five Thousand Dollars (\$25,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the 10th day of April, 1948, until paid, together with attorneys' fees in the sum of Five Thousand Dollars (\$5,000.00), said sums to be taxed as costs in said action, and their costs and disbursements herein incurred.

/s/ HERMAN H. ROSS,
Attorney for Plaintiffs.

/s/ BAILEY E. BELL,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska—ss.

Herman H. Ross, being first duly sworn, upon oath, deposes and says: That he is one of the attorneys for the plaintiffs mentioned in the above Amended Complaint; that neither of the defendants are in Anchorage, Alaska at this time; that due to the absence of the plaintiffs he makes this verification. That he has read the above and foregoing Amended Complaint, knows the contents thereof and that the same is true, as he verely believes.

/s/ HERMAN H. ROSS.

Subscribed and sworn to before me this the 11th day of December, 1948.

[Seal] /s/ [Illegible]

Notary Public in and for the Territory of Alaska.

My Commission Expires on the 8th day of May, 1950.

[Endorsed]: Filed December 11, 1948.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the above named defendant, and in answer to the First Cause of Action contained in the Amended Complaint of the Plaintiffs, admits, denies and alleges as follows:

I.

In answer to paragraph I. of Plaintiffs' Amended Complaint, the defendant does not have sufficient information on which to form a belief and therefore denies the allegations therein contained.

II.

Defendant admits the allegations contained in paragraph II of Plaintiffs' Amended Complaint.

III.

As to Paragraph III of said Amended Complaint, defendant has insufficient information on which to form a belief and therefore denies that plaintiffs were a partnership engaged in the logging business at the times and at the places alleged in paragraph III of said Amended Complaint.

Defendant admits that on or about June 23, 1945, a timber sale agreement was entered into between the United States Government and the Barry Arm Camp as represented by one, Raymond Grasser, but defendant alleges that said agreement as extended expired on December 31, 1947, and was not revived until July 10, 1948, and on information and belief defendant denies the other allegations contained in Paragraph III of said Amended Complaint.

IV.

In answer to Paragraph IV of said Amended Complaint, defendant admits that Tom Morgan and Ted Rowell were respectively an officer and employee of the defendant, but defendant denies each and every other material allegation therein contained.

V.

Defendant denies each and every material allegation contained in Paragraph V of said Amended Complaint.

VI.

As to Paragraph VI of said Amended Complaint, Defendant denies that \$25,000.00 together with interest thereon at the rate of six (6%) per cent per annum, or that any sum whatsoever is now owing by the defendant to the plaintiffs.

VII.

Defendant denies the allegations contained in paragraph VII of said Amended Complaint.

As to Plaintiffs' Third Cause of Action, contained in said Amended Complaint, defendant admits, denies and alleges as follows:

I.

The defendant incorporates herein and by reference makes the same a part of its Answer to Plaintiffs' Third Cause of Action, of said Amended Complaint, all of paragraphs numbered I, II, III and VII of its Answer to paragraphs numbered I, II, III and VII of Plaintiffs' First Cause of Action which have been incorporated in Plaintiffs' Third Cause of Action, and Defendant denies each and every other material allegation contained in Plaintiffs' Third Cause of Action.

Wherefore defendant prays that Plaintiffs' Amended Complaint be dismissed, and that they go without day, and that defendant have judgment

against the plaintiffs for its costs and disbursements herein, including a reasonable attorneys' fee, and for such other and further relief as may be meet and just in the premises.

FAULKNER, BANFIELD &
BOOCHEVER,
/s/ J. L. McCARREY, JR.,
Attorneys for Defendant.

United States of America,
Territory of Alaska—ss.

I, Thomas A. Morgan, being first duly sworn, depose and say: That I am President of the above named defendant corporation, Columbia Lumber Company, Inc.; that I have read the foregoing Answer to Amended Complaint and know its contents and that the facts stated therein are true and correct as I verily believe; and that I make this verification on behalf of said defendant.

/s/ THOS. A. MORGAN.

Subscribed and sworn to before me this 7th day of February, 1949.

[Seal] /s/ R. BOOCHEVER,
Notary Public for Alaska.

My Commission Expires Oct. 20, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 11, 1949.

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Come now the above named plaintiffs and in compliance with the ruling and order of the Court, file this, their second amended complaint, and for their cause of action, allege and state:

I.

That plaintiffs Bruno Agostino and Stanley Socha, at all times herein mentioned were co-partners, doing business under the firm name and style of Barry Arm Camp.

II.

That plaintiffs are informed and believe, and therefore allege the facts to be true, that the defendant is now, and, at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the Territory of Alaska.

III.

That from sometime during the year of 1944, and up to and including the 24th day of March, 1948, plaintiffs were a partnership engaged in a logging business under the firm name and style of Barry Arm Camp, on Mosquito Creek in Prince William Sound, Territory of Alaska.

That on or about June 23, 1945, a timber sale agreement had been issued to the plaintiffs by the United States Department of Agriculture, by and through the Forest Service, and said timber sale agreement had been renewed and extended up to the 31st day of December 1948; the plaintiffs were

in possession of the land covered thereby, and were entitled to cut 250,000 feet BM of logs and timber, and had paid in advance for said privilege, the sum of two hundred fifty dollars, (\$250.00).

IV.

That the plaintiffs were also the owners of the following described property, in and around Barry Arm Camp, near the mouth of Mosquito Creek on Prince William Sound, in the Third Judicial Division of the Territory of Alaska, as follows, to wit:

1—24'x30', two story bunk house and cook house, furnished with a stove, cooking utensils, dishes, beds, mattresses and springs of the reasonable value of \$6000.00;

20—boom logs and 20 connection chains of the reasonable value of \$734.00;

That plaintiffs had built roads that cost them \$2000.00, and were of the reasonable value of \$2000.00;

Blocks and lines of the reasonable value of \$1500.00;

1—Donkey engine and cables of the reasonable value of \$5000.00;

1—Donkey sled of the reasonable value of \$1,000.00;

1—D-8 caterpillar tractor of the reasonable value of \$5000.00;

1—D-7 caterpillar tractor of the reasonable value of \$5000.00;

1—saw mill of the reasonable value of \$1950.00;

1—electric light plant of the reasonable value of \$100.00;

1—drill press of the reasonable value of \$150.00;

2—vices of the reasonable value of \$50.00;

1—anvil of the reasonable value of \$25.00;

Mixed tools of the reasonable value of \$1000.00;

Timber rights for the cutting of 250,000 feet BM, of which 25,000 feet was suitable for trap logs, and were worth to the plaintiffs, or any other persons in the logging business, similarly situated, the sum of \$45.00 per 1000 feet, and it would cost approximately \$22.50 per 1000 feet to cut and market the same, leaving a profit in the actual value of the timber rights to be \$562.50 on the trap logs, and the balance of said timber, to wit: 225,000 feet BM at \$22.00 per 1000 feet, would market for \$4950.00 in the waters of Mosquito Creek at Barry Arm Camp, and it would cost plaintiffs or defendant either, approximately 50% of that amount to cut and market said timber, and that the net value of the timber would be \$2475.00;

6—barrels of diesel oil of the reasonable value of \$90.00;

1½—barrels of gasoline of the reasonable value of \$22.50;

A log pond that had cost the plaintiffs for one month of labor of four men and a caterpillar tractor \$3753.00, and that the pond was of the reasonable value of \$3753.00;

That said property above described was, at all times herein alleged, of the reasonable value of \$37,412.00.

V.

Plaintiffs further allege that on or about the 24th day of March, 1948, the plaintiffs sold to the defendant, Columbia Lumber Company, Inc., a corporation, all of the above described property, and gave to the defendant, at its request, possession of all of the above described property, and the defendant thereby became indebted to the plaintiffs and obligated to pay the plaintiffs therefor, the reasonable value thereof.

VI.

That the defendant did take the property, now retains the same, and has failed, neglected, and refused to pay the plaintiffs therefor, and has paid nothing to the plaintiffs for the same. That by reason thereof, the defendant is justly indebted to the plaintiffs in the sum of \$37,412.00, but plaintiffs seek to recover only the sum of \$25,000.00; that due demand for the payment thereof, has been made by the plaintiffs on the defendant, and that the defendant has failed, neglected, and refused to pay said sum, or any part thereof, and that the same is now all due and owing from the defendant to the plaintiffs.

Wherefore, plaintiffs pray judgment against the defendant for the sum of \$25,000.00, with interest thereon from the 24th day of March, 1948, at the

rate of 6% per annum, and all costs of this action, including a reasonable sum as attorneys' fees, to be fixed by the Court, and for such other and further relief as the Court deems just and equitable in the premises.

/s/ BAILEY E. BELL,

/s/ HERMAN H. ROSS,

Attorneys for Plaintiffs.

United States of America,
Territory of Alaska.

Bruno Agostino, being first duly sworn on oath, deposes and says: That he is the above named plaintiff mentioned in the foregoing Complaint; that he has read the same and knows the contents thereof, and that the same is true and correct as he verily believes.

/s/ BRUNO AGOSTINO.

Subscribed and Sworn to before me this 2nd day of June, 1949.

[Seal] /s/ BAILEY E. BELL, JR.,

Notary Public,

Territory of Alaska.

My commission expires 5/3/53.

Service of a copy of above acknowledged this 2nd day of June, 1949.

/s/ EDWARD V. DAVIS,

Of Attorneys for Defendant.

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

MOTION TO STRIKE AND MAKE MORE
DEFINITE AND CERTAIN

Comes now the defendant in the above entitled action, by and through its attorneys, and moves the Court as follows:

I.

To strike so much of paragraph VI of plaintiff's second amended Complaint as commences on line four of said paragraph and as reads as follows:

“\$37,412.00, but plaintiffs seek to recover only the sum of”

for the reason that that portion of said second amended Complaint is irrelevant, redundant and frivolous.

II.

To require the plaintiffs to make their second amended Complaint more definite and certain by setting forth, with reference to paragraph V thereof, the name or names of the person or persons to whom plaintiffs sold the property described in said paragraph, and the name or names of the person or persons at whose request it is alleged that possession was given to said property, and in what capacity said person or persons claimed to be acting for the defendant.

III.

To require the plaintiffs to make their second amended Complaint more definite and certain by

setting forth, with respect to paragraph VI thereof, the name or names of the individual or individuals who demanded payment of the defendant, the time and place where such demand was made, the name or names of the person or persons who allegedly received such demand on behalf of the defendant, and in what capacity such person or persons claimed to be receiving such demand.

Dated at Anchorage, Alaska, this 2nd day of June, 1949.

FAULKNER, BANFIELD &
BOOCHEVER and
DAVIS & RENFREW,
Attorneys for Defendant.

By /s/ R. BOOCHEVER.

Copy received this 2nd day of June, 1949.

/s/ HERMAN H. ROSS,
Attorney for Plaintiffs.

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM TO
SECOND AMENDED COMPLAINT

Comes now Columbia Lumber Company, Inc., a corporation, the above named defendant, and by way of answer and counterclaim to plaintiff's Second Amended Complaint, admits, denies and alleges as follows:

I.

Defendant admits the allegations of Paragraphs I and II of plaintiff's Second Amended Complaint.

II.

Defendant admits the allegations of the first paragraph of Paragraph III of plaintiff's Second Amended Complaint, except that defendant alleges that in all negotiations concerning the matter here at issue, defendant dealt with the plaintiff, Bruno Agostino, and at that time defendant had no knowledge or information that plaintiff, Stanley Socha, was interested in the property which is the subject of this action.

III.

Defendant admits that on or about the 23rd day of June, 1945, a timber sales agreement was issued to certain parties believed by defendant to be predecessors in interest of the plaintiffs by the United States Forest Service, an agency of the United States Department of Agriculture, and that said timber sales agreement was renewed and extended to and including the 31st day of December, 1948, and in that connection alleges that the timber sales agreement above mentioned expired on the 31st day of December, 1947 and was, on or about the 10th day of July, 1948, renewed and extended for the period ending December 31, 1948. Defendant has no knowledge or information sufficient to form a belief concerning the other allegations of the second paragraph of Paragraph III of plaintiff's Second

Amended Complaint, and for that reason denies each and all of such allegations.

IV.

Defendant has no sufficient knowledge or information to form a belief concerning the allegation contained in Paragraph IV of plaintiff's Second Amended Complaint having to do with the ownership of the property described in said paragraph and located in and around Barry Arm Camp, and for that reason denies each and all the allegations contained in such paragraph concerning ownership of the property. Defendant specifically denies that the values set opposite the various items in such paragraph were or are the reasonable value of such items, or that such property in the aggregate was of the reasonable value of \$37,412.00, or any sum at all in excess of \$9,000.00 for all the property owned by plaintiffs or claimed by them at the time and place in question. In that connection, as defendant is informed and believes, and so alleges the fact to be, certain of the property described in Paragraph IV of plaintiff's Second Amended Complaint belonged to third parties, and has since been repossessed and taken from the premises by such third parties, to-wit:

- 1 donkey engine and cables
- 1 D-8 caterpillar tractor
- 1 D-7 caterpillar tractor

V.

Defendant denies each and all the allegations of

Paragraph V of plaintiff's Second Amended Complaint, and in that connection alleges that on or about the last day of June, 1948, plaintiff, Bruno Agostino, and defendant reached an agreement for the sale of the property located at plaintiffs' camp at Barry Arm Camp for the sum of \$10,000.00, and that such agreement was reduced to writing and was by the plaintiffs repudiated, all as will more fully appear from defendant's first affirmative defense hereinafter set forth.

VI.

Defendant admits that it has paid nothing to plaintiffs, and denies each and all the other allegations of Paragraph VI of plaintiff's Second Amended Complaint, and in that connection reference is made to the allegations contained in defendant's first affirmative defense contained in its answer to plaintiff's Second Amended Complaint, and by reference incorporates the allegations of such affirmative defense to the same extent as though set out in full at this point.

First Separate Answer and Affirmative Defense

As a first separate answer and affirmative defense to plaintiff's Second Amended Complaint, defendant alleges as follows:

I.

That on or about the last day of June, 1948, defendant made an oral agreement with the plaintiff, Bruno Agostino, by the terms of which defendant

agreed to purchase and plaintiff, Bruno Agostino, agreed to sell, all of the equipment, buildings and property claimed by the plaintiff located at a place known as Barry Arm Camp, for an agreed price of \$10,000.00. \$3,300.00 of such sum was to be deposited with the Clerk of the Court pending settlement of a dispute as to title to some of such property between Bruno Agostino and one Roy Grasser, or Ray Grasser. At the same time and place it was agreed by the parties that the oral agreement should be reduced to writing by Harold J. Butcher, attorney for the plaintiff, Bruno Agostino. It was further agreed by the parties that the agreement there reached contained all the terms and conditions in connection with the agreement in question, and that there were no other agreements, verbal or written, pertaining to the sale of the property above mentioned or to the method of payment for such property, except as set forth in the agreement, all as will more fully appear from Exhibit "A" hereto attached and by reference made a part of this paragraph to the same extent as though set out in full herein.

II.

That on or about the 2nd day of July, 1948, the oral agreement above mentioned was reduced to writing, save and except that such agreement as written did not include a list of the property being sold, and thereupon the agreement as written was signed by plaintiff, Bruno Agostino, and acknowledged by said party, and was submitted to defend-

ant by plaintiff's attorney by mail directed to the defendant at Juneau, Alaska.

III.

That defendant received the written agreement above mentioned on or about the 5th day of July, 1948, and thereupon came to Anchorage, Alaska to consult with defendant's attorney about such agreement, and at that time found that defendant's attorney had left Anchorage and would be absent for a short while. That thereafter, on or about the 19th day of July, 1948, defendant notified plaintiff's attorney by letter that the agreement was satisfactory with the exception of the fact that it did not include a list of the property being sold. That a copy of defendant's letter directed to plaintiff's attorney dated July 19, 1948 is hereto attached marked Exhibit "B," and by reference made a part of this answer to the same extent as though set out in full herein.

IV.

That on or about the 10th day of July, 1948, the agreement above mentioned was executed on behalf of the defendant, by its President, Thomas A. Morgan, and was delivered to defendant's attorney J. L. McCarrey, Jr., of Anchorage, Alaska, together with checks in the amount of \$5,000.00 representing the initial payment to be made under the terms of such agreement, together with all other payments to be made by defendant under such agreement until September 15, 1948, and at that time defendant's at-

torney was directed to deliver the executed agreement to plaintiff's attorney and to deposit the initial payment with the Clerk of the Court according to the terms of the agreement upon plaintiff's furnishing a list of the property to be sold in accordance with the oral agreement later reduced to writing above mentioned, and defendant's attorney was directed to deliver the other checks to plaintiff as the amounts represented by such checks became due under the terms of the agreement. At that time plaintiff's attorney was notified that defendant was ready and willing to consummate the purchase agreement upon plaintiff's furnishing the list of property to be sold as above mentioned.

V.

That a copy of the written agreement above mentioned is hereto attached marked Exhibit "A," and by reference is made a part of this answer to the same extent as though set out in full herein.

VI.

That plaintiff refused to furnish a list of the property being sold, and claimed that a part of the property which plaintiff theretofore had agreed to sell, namely, a certain cabin located within the Barry Arm Camp, was not to be included in the sale, and refused to execute a bill of sale or otherwise to consummate the purchase agreement.

VII.

That under the terms of the agreement above mentioned, hereto attached marked Exhibit "A,"

defendant removed two certain caterpillar tractors included in the terms of such purchase agreement from plaintiff's camp, a distance of approximately one mile to defendant's camp, and proceeded to repair such tractors preparatory to using them under the sale defendant thought had been consummated, and that in such repair defendant expended in excess of \$2,000.00 in labor and materials.

VIII.

That the caterpillar tractors above mentioned were not used by the defendant at any time for logging purposes, but that one of such tractors was used for the purpose of towing the other tractor from plaintiff's camp to defendant's camp, and for the purpose of hauling a small amount of oil and supplies from one portion of defendant's camp to another portion thereof.

IX.

That under the terms of the agreement above mentioned, a copy of which is hereto attached marked Exhibit "A," defendant used the bunk house portion of plaintiff's Barry Arm Camp as living quarters for one of its employees from approximately the 1st day of August, 1948, to the 1st day of September, 1948.

X.

That immediately upon learning that plaintiff, Bruno Agostino, had repudiated the written agreement above mentioned and had refused to consummate the agreement, defendant, on or about the 1st

day of September, 1948, vacated the bunk house above mentioned and returned the caterpillar tractors above mentioned to their former location on plaintiff's premises.

XI.

That the purchase agreement above mentioned was never consummated due to the refusal of plaintiff to consummate the same, and defendant, as it is informed and believes, and so alleges the fact to be, should not be held liable to plaintiff for any damages. If in fact plaintiff was damaged by such possession, such damages should not exceed the reasonable rental value of the bunk house above mentioned and of the caterpillar tractors above mentioned during the time such property was retained by defendant.

XII.

That defendant did not take possession of the so-called saw mill or the donkey engine, or any of the other equipment which plaintiff had agreed to sell to defendant, except the tractors and bunk house as above set forth.

XIII.

That the tractors above mentioned at the time they were returned to plaintiff's premises, were in better condition than at the time they were removed to defendant's premises, as above set forth, and that the bunk house was left in at least as good condition as it was at the time it was occupied by defendant's employee.

XIV.

That as defendant is informed and believes, and so alleges the fact to be, one of the tractors above mentioned was repossessed by its owner, Ellamar Packing Company, under the provisions of a conditional sales contract entered into between such packing company and the plaintiffs, or their predecessors in interest, such repossession having taken place on or about the 1st day of October, 1948, and that as defendant is informed and believes, and so alleges the fact to be, the donkey engine and the other caterpillar tractor were taken from the premises on or about the 25th day of September, 1948 by one Raymond Grasser under some sort of claim of ownership of such property by the said Raymond Grasser.

XV.

That defendant does not have possession of any of plaintiff's property or equipment, and never had possession of any of such property or equipment except as to the bunk house and the tractors above mentioned, and such property was returned by defendant to plaintiff's premises on or about the 1st day of September, 1948, as above set forth.

As a second separate answer and second affirmative defense to plaintiff's Second Amended Complaint, defendant alleges as follows:

I.

Defendant adopts the allegations of Paragraphs numbered I through XV of its first separate answer

and affirmative defense in alleging its second separate answer and affirmative defense, and by reference thereto re-alleges and adopts such allegations to the same extent as though set forth in full herein.

II.

That plaintiff, Bruno Agostino, breached the terms and conditions of the agreement entered into by the parties on or about the last day of June, 1948, above mentioned, by refusing to deliver a list of the property covered by the agreement and by attempting to exclude some of the property covered by the agreement, and by repudiating such agreement, all as has heretofore been set forth.

III.

That in making the agreement above mentioned, plaintiff, Bruno Agostino, expressly and by implication, warranted that he had good title to the property in question free and clear of all encumbrances, and had the present right to sell the same except as to the possible claim of Raymond Grasser to the extent of \$3,300, as above set forth.

IV.

That in truth and in fact, as plaintiff well knew, he had no title to the R. D.-8 caterpillar tractor which was a part of the property covered by the agreement, and as plaintiff well knew, such tractor was owned by Ellamar Packing Company, and that the only interest of plaintiff therein was by reason of a conditional sale contract claimed by the vendor to be in default. That as defendant is informed and

believes, and so alleges the fact to be, the vendor, Ellamar Packing Company, on or about the 1st day of October, 1948, repossessed the tractor above mentioned and took it away from Barry Arm Camp to some place unknown to defendant.

V.

That defendant at all times has been ready, willing and able to perform the agreement above mentioned on its part, but was prevented from so performing by the breach of such agreement and its repudiation by plaintiff, Bruno Agostino.

As a third separate and further answer to plaintiff's Second Amended Complaint, and by way of counterclaim thereto, defendant alleges as follows:

I.

Defendant adopts the allegations of Paragraphs numbered I through XV of its first separate answer and affirmative defense and Paragraphs numbered I through V of its second separate answer and affirmative defense, in alleging its third separate and further answer to plaintiff's Second Amended Complaint, and its Counterclaim and by reference thereto re-alleges and adopts such allegations to the same extent as though set forth in full herein.

II.

The plaintiffs were unjustly enriched in the sum of Two Thousand (\$2,000.00) Dollars represented by the value of materials and labor expended on the tractors above described by defendant in reliance

upon plaintiffs' agreement made on or about the last day of June, 1948.

III.

That defendant has been damaged in the sum of Two Thousand (\$2,000.00) Dollars, the amount expended upon said tractors as a result of the breach and repudiation of the agreement made by the plaintiff, Bruno Agostino.

Wherefore, defendant prays for judgment in this matter as follows:

1. That plaintiffs take nothing by reason of their second Amended Complaint filed in this action.

2. That defendant may have and recover judgment against plaintiffs for the sum of Two Thousand (\$2,000.00) Dollars on defendant's counterclaim.

3. For defendant's costs and disbursements in this action incurred, including a reasonable attorneys' fee to be set by the Court.

4. For such other and further relief as to the Court may seem meet and equitable in the premises.

FAULKNER, BANFIELD and
BOOCHEVER,
J. L. McCARREY, JR.,
DAVIS & RENFREW,
Attorneys for Defendant,

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

I, Thomas A. Morgan, being first duly sworn, depose and say: That I am President of the above named corporation, Columbia Lumber Company, Inc.; that I have read the foregoing Answer and Counterclaim to Second Amended Complaint and know the contents thereof, and that the facts stated therein are true and correct as I verily believe; and that I make this verification on behalf of said defendant.

/s/ THOS. A. MORGAN.

Subscribed and sworn to before me this 2nd day of June, 1949.

[Seal] /s/ EDWARD V. DAVIS,
Notary Public for Alaska.

My Commission expires: 11-7-1950.

EXHIBIT A.

Sales Agreement

This agreement, entered into this.....day of July, 1948, by and between BRUNO AGOSTINO of Anchorage, Alaska, the party of the first part, hereinafter referred to as the seller, and the COLUMBIA LUMBER COMPANY, a corporation organized under the laws of the Territory of Alaska, with headquarters at Juneau, the party of the second part, hereinafter referred to as the purchaser.

Witnesseth: Whereas the seller has in the past performed certain logging operations at Barry Arm in the Prince William Sound area under Forest Service permit, and

Whereas the purchaser is now engaged in similar operations at the same place, and

Whereas upon the termination of the logging operations of the seller, he left certain buildings, materials, and equipment at the Barry Arm Camp, and

Whereas, these buildings, materials, and equipment are of value to the purchaser and said purchaser can make use of the same in its logging operations,

Wherefore, it has been mutually agreed that the seller will sell and the purchaser will purchase all those buildings and all of that equipment and all of those materials now located at Barry Arm in the Prince William Sound area and the purchaser will purchase all of the above mentioned buildings, materials, and equipment for the total sum of Ten Thousand Dollars (\$10,000.00), lawful money of the United States, to be paid by the said purchaser to the seller in accordance with the following terms and conditions:

That following the signing of this instrument and before the 10th day of July, 1948, the purchaser will deposit with the Clerk of the District Court for the Third Division at Anchorage, Alaska, by and through Harold J. Butcher, Attorney for the seller, the sum of Thirty Three Hundred Dollars

(\$3300.00) which sum is to be held on deposit in escrow by said Clerk of said Court for the purpose of saving the purchaser harmless from any claim made against the seller's camp and equipment and materials the subject of this purchase, by Roy Grasser, who has filed suit seeking from the seller the amount above stated; and it is agreed that the said sum will remain on deposit and will be held in escrow with said Clerk until the litigation between the seller and the said Ray Grasser has been settled by the Court. In the event that the seller is successful and a decision is made in his favor that no monies are due and owing to the said Ray Grasser, then said sum will be turned over to the said seller and if the decision is in favor of Ray Grasser in the sum stated or in any part of said sum, then said sum will be paid over to Ray Grasser by the said Clerk of the Court, or that part required to satisfy said judgment. In the event that there remains monies in the escrow account which are not ordered payable to Ray Grasser by the Court, then such sums shall be made payable upon settlement to the seller herein named.

It is further agreed that on or before the 15th day of July, 1948, the purchaser will pay into the account of the seller at the Bank of Alaska at Anchorage the Sum of Seven Hundred Dollars (\$700.00), and then commencing on or before the 15th day of August, 1948, the sum of One Thousand Dollars (\$1000) per month paid in the account as indicated above and the same sum on each subsequent month

thereafter until six (6) payments of One Thousand Dollars (\$1000) each have been made into the account of the Seller. It is specifically agreed that there shall be no payment of interest on any amount herein stated.

Immediately upon the signing of this instrument by the purchaser and notice of such signing conveyed to the seller or to his attorney, Harold J. Butcher, a bill of sale covering all of the buildings, materials and equipment located at Barry Arm will be placed in escrow at the Bank of Alaska to be delivered to the purchaser upon its making payment in full the purchase price herein set forth.

The seller agrees that upon the execution of this instrument, the said purchaser may take possession of said buildings, materials and equipment located at Barry Arm and make use of the same in such manner as the said purchaser desires, and that for all practical purposes said buildings, materials and equipment will be treated as though full title had passed to the purchaser.

This contract and all its terms and conditions shall inure to and be obligatory upon the parties hereto, their heirs, executors, administrators, successors and assigns.

It is hereby specifically agreed that all the terms and conditions in connection with this contract have been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 29th day of July, 1948.

/s/ BRUNO AGOSTINO

Seller

COLUMBIA LUMBER
COMPANY

By /s/ THOS. A. MORGAN

Pres.

United States of America,
Territory of Alaska—ss.

Be It Remembered that on this 29th day of July, 1948, before me, the undersigned Notary Public in and for Alaska, personally appeared Bruno Agostino, one of the parties named herein, known to me and to me known to be the seller herein named, and he acknowledged to me that he signed and executed the foregoing instrument freely and voluntarily for the uses and purposes therein mentioned.

Witness My Hand and official seal the day and year hereinabove last written.

[Seal] /s/ HAROLD J. BUTCHER,
Notary Public in and for
Alaska.

My commission expires April 23, 1949.

EXHIBIT B

July 19, 1948

Mr. Harold Butcher
Attorney at Law
Anchorage, Alaska

Dear Mr. Butcher:

Conformant with your letter of July 2, 1948, I arrived in Anchorage on July 10th and brought the contract back with me to discuss it with you.

I have been advised that it will be another week before you return and find business conditions such that I am unable to wait any longer.

The contract you have prepared is acceptable to the Columbia Lumber Company for the most part, except for the fact that no place is itemized the personal property we are getting for the purchase price of \$10,000. That is the reason why I came personally so that I could discuss that portion of the contract with you. I am sure you would not expect me to sign it without a definite understanding as to what the \$10,000 is going to purchase.

I have signed a check in the sum of \$3,300 and left it with Mr. C. D. Summers, with instructions to pay it to the Clerk of the Court upon your giving him an acceptable list of all the personal property which the Columbia Lumber Company is to get under the contract.

Sorry I didn't get to see you and trust that you

will be able to work this out with Mr. Summers immediately upon your return.

Yours very truly,

/s/ THOMAS MORGAN,

President, Columbia Lumber
Company.

[Endorsed]: Filed June 2, 1949.

[Title of District Court and Cause.]

REPLY TO ANSWER AND ANSWER TO
COUNTER CLAIM

Come now the above named plaintiffs and for their reply to the answer of the defendant, allege and state:

I.

Plaintiffs deny all the affirmative allegations of paragraph 2.

II.

Plaintiffs deny that the timber sales agreement referred to in paragraph 3 of said answer had expired on the 31st day of December 1947, and allege the facts to be that said timber sales agreement was extended by the payment of \$250.00 as evidenced by the check introduced in evidence, dated October 31, 1947, and at no time had the timber sales agreement expired.

III.

Plaintiffs deny the allegations in paragraph 4 of said answer, wherein it is alleged "That certain of the property described in paragraph 4 of plaintiffs' second amended complaint belong to third parties" and allege the facts to be, that all of said property was owned by these plaintiffs herein.

IV.

For answer to paragraph 5, plaintiffs admit that there was at one time an offer of compromise for ten thousand dollars (\$10,000.00), and further allege that the defendant failed, neglected and refused to go through with said offer of compromise, and allege the facts to be that the defendant failed to pay the sums of money set forth in said purported contract; failed to pay any part thereof; failed to make the deposit with the Clerk of the Court; failed so far as these plaintiffs know, to ever sign said contract until long after this suit was filed, and deny that the contract was signed by the defendant in this case in good faith, and allege that it was done after this suit was filed and was never delivered to the plaintiffs, and that the signing thereof, was done in bad faith and for the purpose of reducing the plaintiffs' amount of recovery to \$10,000.00, and that said contract was not based upon a valuable consideration, was not executed and delivered, and is therefore, not binding on these plaintiffs.

V.

Plaintiffs for reply to paragraph 6, deny the affirmative allegations therein contained, and the whole thereof, except such allegations as are admitted in the following paragraph.

Reply to the Defendant's First Separate Answer and Affirmative Defense.

Plaintiffs for reply to the defendant's first separate answer and affirmative defense admit that:

I.

In June or July 1948, the defendant did enter into a compromise agreement with Bruno Agostino, by which the defendant offered to pay, and Bruno Agostino offered to settle for the sum of \$10,000.00, with an understanding that \$3300.00 of such sum was to be deposited with the Clerk of the Court pending settlement of a dispute as to a title to some of such property between Bruno Agostino and one Ray Grasser, admit that the agreement was to be reduced to writing by Harold J. Butcher, and was reduced to writing, and was signed by Bruno Agostino, and deny all of the rest, residue, and remainder of said paragraph, and further alledge the facts to be that said oral agreement was an offer of compromise and was not based upon any consideration, and that the defendant failed, neglected, and refused to go through with said agreement, and that the compromise made on behalf of Bruno Agostino was by reason of having spent two or three months trying to get the defendant to pay him for his property, and that Bruno Agostino had an agreement

with the president of the defendant company, Thomas Morgan, that he was leaving Barry Arm Camp, and would return in two days and settle with him, and that Bruno Agostino had waited there at the camp for a period of approximately three weeks, and that Thomas Morgan never returned to pay him for the equipment, and that by reason of the promises made on behalf of the defendant company, the plaintiffs had permitted the defendant to come onto his property, and to take possession thereof, and the defendant had gained exactly what it had wanted, by getting in possession of plaintiffs property, and then by dodging the plaintiffs and failing to meet one of the plaintiffs, Bruno Agostino, and had worn him out by dodging him, and running around over the country until, the plaintiff was desperate financially, and that said agreement to settle for \$10,000.00 was entered into by Bruno Agostino, rather than to go to Court, and have to employ counsel and pay court costs and other expenses that he was not able to pay, all of which, amounted to oppression, duress, and fraud on the part of the defendant, which fraud was perpetrated by Thomas Morgan, president of said defendant company.

II.

Plaintiffs for answer to paragraph two of the First Separate Answer and Affirmative Defense, of the defendant, admit that a contract was reduced to writing but specifically allege that the plaintiffs, acting by and through, Bruno Agostino, offered to furnish an itemized statement of the property sold

to the defendant, and the defendant, acting by and through, Thomas Morgan, said he did not want an itemized statement, that he knew all about what was there, and that when the bill of sale was made out, the items could be set out therein, in full, but allege that the defendant never complied with said contract, and that the purported contract became void.

III.

Plaintiffs for reply to paragraph three of defendant's First Separate Answer and Affirmative Defense, is not sufficiently informed and advised so as to form an opinion as to the truth thereof, and therefore deny all of the allegations in said paragraph, and the whole thereof.

IV.

Plaintiffs for reply to defendant's First Separate Answer and Affirmative Defense, allege that they are not sufficiently informed or advised as to the truth of the allegations therein contained, and therefore, deny the same, and the whole thereof.

V.

Plaintiffs for reply to paragraph five of the defendant's First Separate Answer and Affirmative Defense deny that said purported written agreement referred to as Exhibit "A" ever became a binding contract between plaintiffs and defendant.

VI.

Plaintiffs for reply to paragraph six of defendant's First Separate Answer and Affirmative De-

fense deny all of the allegations therein contained, and the whole thereof.

VII.

Plaintiffs for reply to paragraph seven of defendant's First Separate Answer and Affirmative Defense allege that they have no knowledge of the allegations therein contained, sufficient to form an opinion as to the truth thereof, and therefore, deny said allegations, and the whole thereof.

VIII.

Plaintiffs for reply to paragraph eight of the defendant's First Separate Answer and Affirmative Defense allege that they are not sufficiently informed so as to form an opinion as to the truth thereof, and therefore, deny the allegations therein contained, and the whole thereof.

IX.

Plaintiffs for reply to paragraph nine of the defendant's First Separate Answer and Affirmative Defense admit that said defendant did use the bunk house and cook house at Barry Arm Camp, but allege the truth to be, that the defendant still has possession thereof, and is now occupying said property, by and through one of its employees, a certain Mr. Hooper.

X.

Plaintiffs for reply to paragraph ten of the defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof.

XI.

Plaintiffs for reply to paragraph eleven of defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof.

XII.

Plaintiffs for reply to paragraph 12 of defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof, except that they admit that the defendant did take possession of the tractor and bunk house, and allege the facts to be, that the defendant took possession of all of the property of the plaintiffs at Barry Arm Camp.

XIII.

Plaintiffs for reply to paragraph 13 of defendant's First Separate Answer and Affirmative Defense, deny the allegations therein contained, and the whole thereof.

XIV.

Plaintiffs for reply to paragraph 14 of defendant's First Separate Answer and Affirmative Defense are not sufficiently informed as to the facts alleged therein, to form an opinion as to the truth thereof, and therefore, deny the said allegations, and the whole thereof, and allege on information and belief, that if the Ellamar Packing Company and the said Ray Grasser did take any of the property sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose

of cheating and defrauding these plaintiffs, and specifically deny that the Ellamar Packing Company had any interest or an enforceable conditional sales contract effecting any of the property, and specifically deny that Ray Grasser had any interest in the property, or any part thereof, or that either Ray Grasser or the Ellamar Packing Company had any right to take possession of the same.

XV.

Plaintiffs for reply to paragraph 15 of the defendant's First Separate Answer and Affirmative Defense deny the allegations therein contained, and the whole thereof.

Reply to Defendant's Second Separate Answer and
Second Affirmative Defense

Plaintiffs for reply to the defendant's Second Separate Answer and Second Affirmative Defense, allege as follows:

I.

Plaintiffs deny the allegations of paragraph 1, and the whole thereof, in defendant's Second Separate Answer and Second Affirmative Defense except such matters as are specifically admitted in this reply.

II.

Plaintiffs for reply to paragraph 2, deny the allegations therein contained, and the whole thereof.

III.

Plaintiffs for reply to paragraph 3, admit the allegations of said paragraph.

IV.

Plaintiffs for reply to paragraph 4 deny all of the allegations therein contained, and the whole thereof, and in addition thereto, allege that if the Ellamar Packing Company did take said tractor, that it was done through the connivance and scheme of the defendant herein, and was wrongfully done, and that the Ellamar Packing Company had no right, title, or interest in and to the said R.D.-8 caterpillar tractor.

V.

Plaintiffs for reply to paragraph 5 deny said allegations, and the whole thereof.

Reply to Defendant's Third Separate Answer
and for Answer to the Counterclaim

Plaintiffs for reply to defendants Third Separate Answer and for Answer to the Counter claim, allege as follows:

I.

Plaintiffs deny the allegation of paragraph 1, and the whole thereof, save and except, such matters as are specifically admitted in their Second Amended Complaint, this Reply, and Answer.

II.

Plaintiffs deny all of the allegations of paragraph 2, and the whole thereof.

III.

Plaintiffs deny the allegations of paragraph 3, and the whole thereof.

Wherefore, plaintiffs having fully replied to the Answer, and answered the Counterclaim, pray that they recover as in their Second Amended Complaint prayed for.

/s/ HERMAN H. ROSS,
/s/ BAILEY E. BELL,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska—ss.

Bruno Agostino, being first duly sworn on oath, deposes and says: That he is one of the above-named plaintiffs mentioned in the foregoing Reply and Answer; that he has read the same and knows the contents thereof, and that the same is true and correct as he verily believes.

/s/ BRUNO AGOSTINO.

Subscribed and Sworn To before me this 3rd day of June, 1949.

[Seal] /s/ BAILEY E. BELL,
Notary Public, Territory of
Alaska.

My commission expires: 1/28/53.

Service of a copy of the above acknowledged this 3rd day of June, 1949.

DAVIS & RENFREW,
By /s/ P. ROBISON,
Attorney for Defendant.

[Endorsed]: Filed June 3, 1949.

[Title of District Court and Cause.]

MOTION TO STRIKE PORTIONS
OF REPLY

Comes now the above-named defendant, by its attorneys, and moves the court to strike the following portions of the reply filed herein by the plaintiffs, for the reasons hereinafter stated:

I.

So much of Paragraph IV of the reply to answer and reply to counterclaim as states on line 2: "offer of compromise"; as states on lines 3 and 4: "said offer of compromise"; line 1 at the top of page 2 of said reply, and so much of lines 3, 4 and 5 of page 2 of said reply as states: "and that the signing thereof was done in bad faith and for the purpose of reducing the plaintiffs' amount of recovery to \$10,000, and that said contract was not based upon a valuable consideration"; and so much of line 6 on page 2 of said reply as states: "and is therefore not binding on these plaintiffs," for the reason that said portions of said paragraph are frivolous, irrelevant, immaterial, plead evidence in part and in part consist of conclusions of law.

II.

So much of Paragraph I of the reply to defendant's first separate answer and affirmative defense as follows: The word "compromise" on line 1 of said paragraph; the words "and further allege the facts to be that said oral agreement was an offer of compromise and was not based upon any consideration," as appears on lines 9, 10 and 11 of

said paragraph, and the remainder of said paragraph commencing with the words "and that the compromise" on line 11 of said paragraph, for the reason that said portions of said paragraph are frivolous, irrelevant, immaterial, plead evidence in part and in part consist of conclusions of law, and contains matter prejudicial to the defendant.

III.

So much of Paragraph 11 of said reply to defendant's first separate answer and affirmative defense as states: "that he knew all about what was there and that when the bill of sale was made out the items could be set out therein in full," on lines 6 and 7 of said paragraph, for the reason that said portion of said paragraph is irrelevant, frivolous, immaterial, and pleads evidence; and so much of said paragraph as states "and that the purported contract became void," on lines 8 and 9 of said paragraph, for the reason that said portion of said paragraph is a conclusion of law.

IV.

So much of Paragraph V of said reply to defendant's first separate answer and affirmative defense as states "that said purported written agreement referred to as Exhibit "A" ever became a binding contract between plaintiffs and defendant," for the reason that said portion of Paragraph V of said reply is frivolous, redundant and pleads a conclusion of law.

V.

So much of Paragraph IX of plaintiffs' reply to

defendant's first separate answer and affirmative defense as states: "the truth to be," on line 3 of said paragraph, for the reason that said portion of said paragraph is irrelevant, redundant and frivolous.

VI.

So much of Paragraph XIV of said reply to defendant's first separate answer and affirmative defense as states: "and allege on information and belief that if the Ellamar Packing Company and the said Ray Grasser did take any of the property sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose of cheating and defrauding these plaintiffs," as appears on lines 4, 5, 6, 7 and 8 of said paragraph, for the reason that said portion of said paragraph is inconsistent with the rest of said paragraph whereby plaintiffs deny that the said Ellamar Packing Company and Ray Grasser did take said property, and for the further reasons that said portion of said paragraph is irrelevant, redundant and frivolous, and for the further reason that said portion of said paragraph pleads conclusions of law and is highly prejudicial to the defendant.

Respectfully submitted this 4th day of June, 1949.

FAULKNER, BANFIELD &
BOOCHEVER,
DAVIS & RENFREW,

Attorneys for Defendant,

By /s/ R. BOOCHEVER.

[Endorsed]: Filed June 4, 1949.

Receipt of copy acknowledged.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, RESERVING RIGHT TO APPLY FOR NEW TRIAL IN THE EVENT THE MOTION IS DENIED

Comes now Columbia Lumber Company, Inc., a corporation, the above-named defendant, such party having heretofore moved that the Court direct a verdict in its favor at the close of plaintiffs' case and at the close of all the testimony received in the trial of the above-entitled cause, and such motion having been denied and a verdict having been returned by the jury in favor of the plaintiffs and against the defendant in the sum of Fourteen Thousand Ninety-two (\$14,092.00) Dollars, and moves that a judgment be entered in favor of the defendant notwithstanding the verdict, for the reason that, as will appear from all the records and files of this action and from the minutes of the Court, the pleadings and the evidence, and exhibits introduced by the respective parties, there was no substantial evidence upon which the plaintiffs were entitled to recover of and from the defendant, and there was no evidence upon which the matter should have been submitted to the jury, and for the reason that defendant's motion for a directed verdict in its favor should have been granted by the Court.

The defendant reserves the right, in the event its motion for judgment notwithstanding the verdict be denied, to apply to the Court for a new trial.

Dated at Anchorage, Alaska, this 10th day of June, 1949.

· FAULKNER, BANFIELD &
BOOCHEVER,
J. L. McCARREY, JR.,
DAVIS & RENFREW,
Attorneys for Defendant.

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed June 10, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Columbia Lumber Company, Inc., a corporation, the above-named defendant, by and through its attorneys, Faulkner, Banfield & Boochever, J. L. McCarrey, Jr., and Davis & Renfrew, and moves that the Court may set aside and vacate the verdict of the jury rendered in the above-entitled cause on the 8th day of June, 1949, and prays that a new trial may be granted to the defendant in such action for the following reasons:

1. The verdict as rendered is not supported by sufficient evidence but is contrary to the evidence.
2. The verdict as given is against the law.
3. The verdict as given is for excessive damages appearing to have been given under the influence of passion, prejudice or sympathy, and is far in ex-

cess of any amount which the plaintiffs might be entitled to recover under the evidence submitted in this cause, if in fact the plaintiffs are entitled to recover any sum at all.

4. Errors in law occurring at the trial and excepted to by the defendant in the following particulars:

(a) The Court erred in allowing over objection of the defendant testimony of alleged oral conversations which supposedly took place between one "Blackie" Lambert and plaintiff, Bruno Agostino, without any showing that the said Lambert had any authority to act for or on behalf of the defendant corporation or any authority to bind such company, and over objections of the defendant to the effect that testimony of oral conversations was a violation of the parol evidence rule and of the best evidence rule in view of the evidence of a written agreement made between the parties on or about June 29, 1948, covering the same subject matter as the alleged oral conversations.

(b) That the Court erred in refusing to strike the testimony concerning the alleged oral conversations above mentioned and in refusing to instruct the jury to disregard such testimony under the undisputed evidence of the execution of the written agreement of June 29, 1948, or thereabouts, and the undisputed testimony concerning the lack of authority of the witness Lambert.

(c) That the Court erred in allowing the admis-

sion of plaintiff's Exhibit No. 1 over objection of the defendant, for the reason that such exhibit did not tend to prove or disprove any of the issues of this case, and was incompetent, irrelevant and immaterial for any purpose and highly prejudicial to the defendant.

(d) That the Court erred in allowing plaintiffs to amend their complaint to set up a new cause of action after granting defendant's motion for a directed verdict at the close of plaintiffs' case, for the reason that there was no evidence sufficient to go to the jury admitted by the Court at the time the motion was made, and for the reason that under all the evidence no agreement had been reached between the parties on or about March 24, 1948, or at any time prior to June 29, 1948, and for the further reason that there was no evidence sufficient to allow an inference that the parties had made an agreement for sale of the property in question complete in all its terms except as to the purchase price, and there was no evidence before the Court which would justify a recovery against the defendant on the theory of quantum valebat.

(e) That the Court erred in allowing the trial to proceed under the Second Amended Complaint filed by plaintiffs after the close of plaintiffs' evidence, and after argument of defendant's motion for a directed verdict and the Court's ruling thereon.

(f) That the Court erred in denying defendant's motion for non-suit made after the Court had

ruled upon defendant's motion for a directed verdict.

(g) That the Court erred in refusing to grant defendant's motion to strike portions of plaintiffs' Second Amended Complaint and to require portions of such Second Amended Complaint to be made more definite and certain, the particular portions more fully appearing in defendant's motion to strike and to make more definite and certain.

(h) That the Court erred in denying defendant's motion to strike portions of plaintiffs' reply made to defendant's answer, such portions more fully appearing from the motion, for the reason that the matters asked to be stricken by the defendant were improper pleading and were highly prejudicial to defendant's defense in this action, and that the instruction given on the prejudicial matters in plaintiffs' reply did not cure the prejudicial matter contained in such reply in view of the fact that such instruction was not given until after argument was had by plaintiffs' attorney, particularly in view of the fact that plaintiffs' attorney argued to a great extent to the effect that the property was removed by the third parties by some sort of collusion or conspiracy between defendant and the third parties, and the instruction as given could not remove the effects of such argument in the minds of the jury.

(i) That the Court erred in its refusal to grant the renewal of defendant's motion for a directed

verdict and non-suit made at the close of the evidence, for the reason that there was no evidence to go to the jury at the close of the evidence even under the theory of quantum valebat, alleged in plaintiffs' Second Amended Complaint made during the course of the trial.

(j) That the Court erred in submitting the matter to the jury, in that there was not sufficient evidence to sustain a verdict for the plaintiffs concerning any agreement for sale or sale had between the plaintiffs and the defendant on or about March 24, 1948, under any theory advanced by the pleading under quantum valebat, or otherwise.

(k) That the Court erred in refusing to instruct the jury as a matter of law that the witness Lambert was an independent contractor from and after April 1, 1948, and that the said Lambert had no authority to bind the defendant to any sale or agreement for sale prior to April 1, 1948.

(l) That the Court erred in failing to instruct the jury that the written agreement entered into between the parties on or about June 29, 1948, together with the letter written by Thomas A. Morgan on behalf of the defendant on July 19, 1948, constituted a valid and existing agreement between the parties and binding upon the parties according to its terms, except as to plaintiffs' subsequent breach and repudiation thereof, and in failing to instruct the jury that any oral conversations had between the parties prior to the date of the written

agreement were merged in the written agreement.

(m) That the Court erred in failing to instruct the jury as requested in defendant's requested Instructions numbered I, II, III, IV, VI, VII, IX, X, XI, XII, XIII, XIV, XV, XVI (except insofar as covered by instructions of the Court as given), XVII, XVIII, XX, XXI, XXII, XXIV, XXVI (except insofar as covered by instructions of the Court as given), XXVII, XXVIII, XXIX, XXXI, the defendant having by proper exception objected to the ruling of the Court in its failure to give such requested instructions.

(n) That the Court erred in giving portions of Instruction No. 4 as follows:

(1) That portion of such instruction commencing with line 8 with the words "in case of land," and ending at the end of the first paragraph, for the reason that such instruction leaves out consideration of the statute of frauds and the inclusion of the statute of frauds in another place does not cure the defect.

(2) That portion of Instruction No. 4 consisting of the last paragraph of the first page of such instruction commencing with the word "in this case," and ending with the end of such paragraph, and Instruction No. 4 continued ending with the words "says there was not," for the reason that under the evidence of this case no agreement of sale was reached between the parties in any manner at all, and to allow the matter to go to the jury on the

theory that an agreement was reached in all respects except price, over proper objections made by the defendant, was improper, highly prejudicial to the defendant, and allowed the jury to speculate on the matter of price when, as a matter of law, defendant should not have been liable to the plaintiffs for any price at all.

(3) That portion of Instruction No. 4 continued, consisting of the last paragraph thereof, for the reason that on the basis of all the evidence the jury could not properly have found that the plaintiff sold and delivered anything to the defendant on or about March 24, 1948, or that the defendant accepted and took possession of any property at that time, and such instruction was given allowed the jury to deduce an implied agreement, where in fact the evidence does not support any implied agreement, and allowed the jury to speculate on the reasonable value of the property when, in fact, as will appear from the evidence, there was no agreement of sale or to sell, express or implied, for the reasonable value of the property or otherwise, and for the further reason that the instruction as given allowed the jury to speculate on what constituted possession without instructing the jury on the matters of possession, and allowed the jury to speculate that possession of unoccupied tidelands and of the waters of a navigable stream constituted taking possession of plaintiffs' property. That defendant, as will appear from exceptions taken in this matter, made timely objection and took proper exception

to the giving of the portions of such instruction to which objection is here made.

(o) That the Court erred in giving portions of Instruction No. 5 as follows:

That portion of Instruction No. 5 commencing on line 5 of such instruction with the words "the law in such cases," and continuing to the end of such instruction, for the reason that such instruction was not justified under the evidence of this case and does not correctly state the law as applicable to this case under the evidence introduced, and for the reason that the undisputed evidence shows that the plaintiffs were not using or occupying the portion of the tideland pond used and occupied by the witness Lambert in his logging operations, and for the reason that there is no evidence before the Court that the witness Lambert had any power or authority from the defendant to use or occupy any lands used or occupied by the plaintiffs, and that as will appear from all the evidence in this case, the witness Lambert in so using and occupying such lands was acting as an independent contractor and not as the agent or servant of the defendant corporation, and for the reason that such instruction allowed the jury to infer that use of a portion of the tideland pond by the independent contractor Lambert constituted a taking of possession of plaintiffs' property, including their logging camp and equipment, by the defendant corporation. Such instruction likewise failed to set forth that paramount title to the tidelands in question were in the

United States of America and did not instruct on the right of a person holding a permit from the United States of America to use and occupy such tidelands. Such instruction likewise failed to clearly set forth the rights of a person possessing tidelands to exclusive possession of such tidelands, and the instruction as given authorized the jury to find that the few hand driven piles placed in one portion of the pond by the plaintiffs constituted exclusive possession of the entire tideland pond, and in fact by using the word "pilings" in its instruction, the Court in effect instructed the jury that the plaintiffs by maintaining a few piles in one portion of the pond according to their evidence, had the superior right to the entire tideland pond in question. Defendant, as will appear from exceptions taken in this matter, made timely objection and took proper exception to the giving of such instruction.

(p) That the Court erred in giving the first portion of Instruction No. 5-A, for the reason that the jury could not properly have found under the evidence before them that plaintiffs and defendant entered into an oral agreement for the sale of plaintiffs' property on or about March 24, 1948, or that defendant accepted and received and took possession of said property as claimed in plaintiffs' Second Amended Complaint, and the jury could not properly have found that there was a sale and delivery of any property by the plaintiffs to the defendant or any acceptance and receipt of said property by the

defendant, and for the reason that there was no evidence on the points above mentioned to be submitted to the jury and that such instruction as given allowed the jury to speculate as to the existence of an agreement which, as a matter of law, was not made by the parties, and allowed the jury to speculate as to an amount of compensation not to exceed \$25,000.00 to be paid by the defendant to plaintiffs where there was no evidence to justify the finding of any agreement or of any sale or of any acceptance of any property under an intention to buy, or of any money due from the defendant to plaintiffs. As to such instruction defendant, as will appear from the exceptions taken, made timely objection and took proper exceptions to the giving of the same.

(q) That the Court erred in giving that portion of Instruction No. 6-A, commencing on line 7 thereof with the words "as a matter of law," and ending in line 14 with the words "about March 24, 1948," for the reason that as a matter of law any oral conversations that may have been had between the parties was merged with the written agreement reached late in June or early July of 1948, and was as a matter of law a bar to the enforcement of any alleged oral agreement prior to that date. Defendant, as will appear from the exceptions taken in this matter, made timely objection and took proper exception to such portion of such instruction.

(r) That the Court erred in giving Instruction No. 6-D, for the reason that on the undisputed evidence Kenneth Lambert was an independent contractor after April 1, 1948, and the Court should have instructed the jury as a matter of law that Lambert was such independent contractor and that any actions taken by Lambert in taking possession of any of plaintiffs' property after April 1, 1948, were the acts of Lambert and not the acts of the defendant corporation, and were not binding on the defendant corporation, and for the reason that there was no question properly to be submitted to the jury in connection with the subject matter of Instruction No. 6-D. That as will appear from the exceptions taken in this matter, defendant made timely objection to such instruction and took proper exception thereto.

Wherefore, defendant prays that the verdict of the jury in the above-entitled matter may be set aside and held for naught, and that defendant may be granted a new trial in the matter.

Dated at Anchorage, Alaska, this 13th day of June, 1949.

FAULKNER, BANFIELD &
BOOCHEVER,

J. L. McCARREY, JR.,

DAVIS & RENFREW,

Attorneys for Defendant,

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed June 16, 1949.

DEFENDANTS' REQUESTED
INSTRUCTIONS

Instruction No. XIV.

The evidence shows that Kenneth D. Lambert (also referred to in this case as "Blackie" Lambert) was an independent logging contractor from and after April 1, 1948. You are therefore instructed that his actions after that date are not binding on the defendant unless expressly authorized by an officer of the defendant empowered to authorize such action, or unless his actions were subsequently ratified by such an officer of the defendant company.

It also appears that prior to April 1, 1948, Kenneth D. Lambert was not employed by the defendant company in such capacity that he was empowered to make purchases or to enter into contracts for the defendant company, or to bind the defendant company in any agreements. Thus, unless you find that the witness Lambert had express authority from the officer of the defendant company empowered to grant such authority to make a purchase or to contract for the defendant company, any statements made by him, if any were made for such a purpose, must be disregarded.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

Instruction No. XVIII.

If you find that some of the property was taken into the possession of the defendant under the terms of a proposed contract of sale and that later the proposed contract of sale was abandoned by the parties, and if you further find that upon such abandonment the property previously taken into possession of the defendant was returned by the defendant to the place from which it had been taken, then you must not find for the plaintiff as to such property.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XIX

You are instructed that a contract to sell or a sale of any goods or choses in action of a value of \$500.00 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

In the subject case there is no evidence of a note or memorandum in writing which has been

introduced other than the contract dated July 29, 1948 and signed by the parties. The plaintiff, however, is not suing on that contract. There is no evidence in this case of a part payment. Thus, unless you find that on or about March 24, 1948 the Columbia Lumber Company, through its authorized agents, accepted part of the goods contracted to be sold and actually received, you must disregard any alleged oral contract of sale, or oral sale allegedly made on or about March 4, 1948.

Sec. 29-1-12, Alaska Compiled Laws Annotated, 1949; 49 Am. Jur. Secs. 607, 608.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XX

You are instructed that there is testimony in this case concerning a certain pond near the mouth of Mosquito Creek, and that the area covered by the pond is tideland. Title to tideland is in the United States of America. Individuals, partnerships or corporations can acquire possessory rights to use tidelands and may erect useful improvements thereon and use and occupy the same subject only to the paramount rights of the United States in such tidelands, but tidelands unoccupied by any person, firm or corporation may be occupied by any other person,

firm or corporation, subject again only to the paramount rights of the United States of America. As applied to the case here under consideration, you are instructed that if you find that the defendant corporation, or its agents, on or about March 24, 1948, occupied a portion of the area covered by the pond above mentioned and that the area occupied by the defendant, or its agents, was not at that time covered by any useful improvements belonging to the plaintiffs, such occupancy by the defendant, or its agents, would not constitute a taking of possession of any of plaintiffs' property. You are further instructed that the belief of the plaintiff, Agostino, if he had such belief, that he had the exclusive right to possession of the tideland pond above mentioned, is immaterial, and you are instructed that the plaintiff, Agostino, had an exclusive possessory right to use only such portion of the pond, if any, which was actually occupied by useful improvements constructed or placed in such pond by the plaintiffs, or their agents, or their predecessors in interest.

Refused except as covered by instructions given.

Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXI

An alleged written contract has been introduced into evidence, by the terms of which document the

plaintiff, Bruno Agostino, agreed to sell all the property at Barry Arm Camp to the defendant for the sum of \$10,000.00, \$3,300.00 of which was to be paid to the Clerk of the Court pending the outcome of a claim against part of the property involved. There is conflicting testimony as to the reason why this contract was not completely performed. Regardless of the validity of the contract, however, you may consider its provisions in determining the value of plaintiffs' property in the event that you should decide that the plaintiffs are entitled to any damages.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXIV

Evidence has been introduced in this case to the effect that the witness Kenneth B. Lambert borrowed six barrels of oil and one and a half barrels of gasoline from the plaintiffs. No testimony has been presented as to whether said barrels of oil and gasoline were returned. The evidence indicates, however, that Mr. Lambert at the time that he borrowed said barrels of oil and gasoline was an independent contractor, and unless you find that he was expressly authorized by a duly empowered officer of the defendant company to borrow such

barrels of oil and gasoline, his actions in that connection are not binding on the defendant and defendant is not liable for any damages sustained by the plaintiffs, if any were sustained, as a result of the borrowing of such barrels of oil and gas. You are further instructed that no evidence has been introduced to the effect that defendant ever authorized the witness Lambert to borrow such barrels of gasoline and oil, or that such action of Mr. Lambert was ever ratified by the defendant.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXVI

Plaintiffs allege in their complaint that on or about the 24th day of March, 1948, the plaintiffs sold to the defendant and gave to the defendant, at its request, certain property and equipment located at Barry Arm. You are instructed that the evidence does not establish a contract of sale of this property between the parties on or about March 24th. The plaintiffs have the burden of proving that they gave to the defendant at the defendant's request, and that the defendant took possession of said property on or about March 24, 1948. In this connection you are further instructed that defendant had the right to use unoccupied tidelands and unoccupied portions

of the public domain, and possession of such areas does not constitute evidence of any sale.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXVII

You are instructed that under the laws of the Territory of Alaska, only the real party in interest is entitled to bring a suit. In this case plaintiffs allege that they sold a certain D-8 caterpillar tractor to the defendant on or about March 24, 1948. In determining the truth of that allegation, you may consider the fact that plaintiffs have filed a Third Amended Complaint against the Ellamar Packing Company asking the court to declare the plaintiffs to be the present owners of what appears to be the same tractor. Plaintiffs would not be entitled to bring such a suit against Ellamar Packing Company had they previously sold the tractor to the Columbia Lumber Company.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXVIII

Defendant in its Answer and Counterclaim to plaintiffs' Second Amended Complaint, alleges in part in Paragraph IV thereof:

“In that connection, as defendant is informed and believes, and so alleges the fact to be, that certain of the property described in Paragraph IV of plaintiffs' Second Amended Complaint belonged to third parties, and has since been repossessed and taken from the premises by such third parties, to-wit:

- 1 donkey engine and cables
- 1 D-8 caterpillar tractor
- 1 D-7 caterpillar tractor.”

The plaintiffs in their reply deny that part of the property belonged to third parties, but by failing to deny the remainder of that portion of defendant's answer, plaintiffs admit that the donkey engine and cable, one D-8 caterpillar tractor and one D-7 caterpillar tractor have since been taken from the premises by third parties.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

INSTRUCTION NO. XXIX

Each party to this action claims to be entitled to damages from the other, the plaintiffs under their

Second Amended Complaint, and the defendant under its Counterclaim. The burden is on each party to prove by a preponderance of the evidence that they *or is* entitled to damages.

The issues to be determined by you are:

First: Did a sale take place on or about March 24, 1948, whereby the plaintiffs sold the property owned by them at Barry Arm to the defendant, gave said property to the defendant at its request, and did the defendant on or about March 24, 1948 take possession of property of the plaintiffs?

If you so find, you must find for the plaintiffs and assess damages in accordance with the provisions of the other instructions which shall be given you.

Second: Was an oral contract of sale, subsequently reduced to writing, entered into on or about June 29, 1948, whereby the plaintiffs, through one of its partners, Bruno Agostino, agreed to sell all of their property at Barry Arm to the defendant for the price of \$10,000.00?

If you answer the second question in the affirmative, you may not find for the plaintiffs, since such a contract would be inconsistent with a sale of the same property having been consummated on or about March 24, 1948.

Third: If you answer the second question in the affirmative, you must then decide whether or not the plaintiffs failed to go through with such agreement or repudiated such agreement by refusing to furnish a list of equipment, if such a list was required by

said agreement, or by refusing to include in the property to be conveyed one cabin, or by failure to have good title to part of the property agreed to be conveyed without having notified defendant of the fact prior to the date of the agreement.

If there was such a repudiation or breach of the agreement by the plaintiffs in any of the manners above set forth, you are instructed that damages cannot be assessed against the defendant if you find that defendant returned the property to the place from which it had been removed, and in such event you are further instructed that the defendant is entitled to damages from the plaintiffs for any loss suffered by the defendant as a result of such a breach of contract.

Refused except as covered by instructions given.
Exception taken.

/s/ ANTHONY J. DIMOND,
District Judge.

[Title of District Court and Cause.]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters

at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

3.

The plaintiffs in this case, Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, by their second amended complaint filed in this action after the commencement of the trial thereof, claim that on or about March 24, 1948, the plaintiffs were the owners of certain property situated in the vicinity of Mosquito Creek, Prince William Sound, Territory of Alaska, of the reasonable value of \$37,412.00, and that on or about said date the plaintiffs

sold all of said property to the defendant and gave to the defendant at its request possession of all of said property and that thereby the defendant became indebted to the plaintiffs and obligated to pay the plaintiffs for said property the reasonable value thereof; that the defendant did take the property and now retains the same and has failed, neglected and refused to pay the plaintiffs therefor and has paid nothing to the plaintiffs for the property; that by reason thereof the defendant is justly indebted to the plaintiffs in the sum of \$37,412.00, but that plaintiffs seek to recover only the sum of \$25,000.00; that demand for payment has been made but that defendant has failed, neglected and refused to pay the said sum of \$25,000.00, or any part thereof and that all of said sum is now due and owing from defendant to plaintiff.

The defendant, Columbia Lumber Company, Inc., by its answer to the plaintiffs' second amended complaint, denies most of the averments thereof, specifically denies that the value set opposite the various items of property listed in the second amended complaint were or are the reasonable value of such items, denies that such property in the aggregate was of the reasonable value of \$37,412.00, or any sum at all in excess of \$9,000.00 for all of the property owned by plaintiffs or claimed by them at the time and place in question; and upon information and belief defendant alleges that certain of the property listed in the second amended complaint belonged to third parties and has been repossessed

and taken from the premises by such third parties, that property consisting of 1 donkey engine and cables, 1 D-8 Caterpillar tractor and 1 D-7 Caterpillar tractor; denies that plaintiffs sold to the defendant the property described in said second amended complaint and denies that plaintiffs gave to the defendant at its request possession of all or any of said property and denies that defendant thereby became indebted to the plaintiffs and obligated to pay to the plaintiffs for said property the reasonable value thereof.

For affirmative defenses to the plaintiffs' second amended complaint, the defendant in its answer thereto alleges that on or about the last day of June, 1948 the defendant made an oral agreement with the plaintiff, Bruno Agostino, by the terms of which defendant agreed to purchase and plaintiff, Bruno Agostino, agreed to sell all of the equipment, buildings and property claimed by the plaintiffs and located at the place known as Barry Arm Camp for an agreed price of \$10,000.00 to be paid in the mode and manner stated in said answer; that on or about July 2, 1948 the oral agreement for the sale and purchase of said property was reduced to writing and was signed and acknowledged by plaintiff, Bruno Agostino; that thereafter said agreement was executed on behalf of the defendant by its President, Thomas A. Morgan, and provisions made for payments called for under said agreement; that plaintiff, Bruno Agostino, thereafter refused to consummate said agreement but in the meantime

the defendant had expended in excess of \$2,000.00 in labor and materials for repairing the tractors covered by said agreement; that defendant did not take possession of the sawmill or donkey engine or any of the other equipment which plaintiff had agreed to sell to defendant except the tractors and the bunkhouse; that said tractors were thereafter returned to the plaintiffs and one of them was repossessed by its alleged owner, Ellamar Packing Company, under the provisions of a conditional sales contract; and upon information and belief defendant alleges that the donkey engine and the other Caterpillar tractor were taken from the premises on or about September 25, 1948 by one, Raymond Grasser, under some sort of claim of ownership by said Raymond Grasser; that defendant does not have possession of any of plaintiffs' property or equipment and never had possession of any part thereof except as to the bunkhouse and tractors mentioned and such property was returned by defendant to plaintiffs' premises on or about September 1, 1948; that plaintiffs had no title at any time to the RD-8 Caterpillar tractor included in the alleged written contract of July 2nd, 1948 but such tractor was owned by Ellamar Packing Company which thereafter repossessed the tractor and took it away from the Barry Arm Camp; that defendant at all times has been ready, willing and able to perform the agreement of July 2, 1948 but was prevented from so performing by the breach of such agreement and its repudiation by plaintiff Bruno Agostino; that the

plaintiffs were unjustifiably enriched in the sum of \$2,000.00 represented by the value of the materials and labor expended on the tractors above described by defendant in alleged reliance upon plaintiff's agreement made on or about the last day of June, 1948.

The plaintiffs in their reply to said answer, deny most of the averments thereof inconsistent with the plaintiffs' second amended complaint; plaintiffs admit that in June or July, 1948, the defendant did enter into a compromise agreement with plaintiff Agostino by which the defendant offered to pay and plaintiff Agostino offered to settle for the sum of \$10,000.00, with an understanding that \$3,300.00, of such sum was to be deposited with the Clerk of the Court pending settlement of the dispute as to title to some of the property in question between plaintiff Agostino and one Ray Grasser; plaintiffs admit that the agreement was to be reduced to writing by Harold J. Butcher and that it was reduced to writing and was signed by plaintiff Agostino; plaintiffs allege that the defendant failed, neglected and refused to go through with said agreement.

When you retire to consider of your verdict you will take with you to the jury room the plaintiffs' second amended complaint, the defendant's answer thereto and the plaintiffs reply to said answer and you may there carefully read and consider said pleadings and determine the precise nature of conflicting claims and statements of plaintiffs and defendant.

Under our practice the defendant is not permitted to respond by further pleading to any new and affirmative matter contained in the plaintiffs' reply, but as a matter of law all such new and affirmative matter which is not in harmony with the defendant's answer is considered denied by the defendant with the same force and effect as though a verified denial of such affirmative matter were made and filed by defendant.

3-A.

The plaintiffs have alleged in their second amended complaint that the contract upon which they rely for the sale of the property to the defendant and the delivery of the property to the defendant was made on or about March 24, 1948. The exact date upon which the contract was made, if any was made, is immaterial provided it was made at all within a reasonable time before or after March 24, 1948. However, the words "on or about" do not put the time at large, but indicate that the date is stated with approximate certainty. "On or about" means the day mentioned or one in close proximity thereto, within the range of several days before or after, and not a variation of three or more months.

3-B.

In this case, as in all civil cases, the burden is upon the plaintiffs to prove their case by a preponderance of the evidence only, and not, as in criminal cases, beyond reasonable doubt. Prepon-

derance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as between the plaintiffs and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiffs to present evidence of greater weight than that in favor of the defendant before plaintiffs are entitled to recover.

As indicated the plaintiffs are required to prove all the elements of their second amended complaint by the greater weight of evidence, and if they have not so proved those elements, or if the evidence is evenly balanced so that you are unable to say on which side is the greater weight of the evidence, or if the greater weight of the evidence is in favor of the defendant, then in any such event the plaintiffs cannot recover from the defendant.

Similarly, the defendant is required to prove all the elements of its counterclaim by the greater weight of the evidence, and if it has not so proved those elements, or if the evidence is evenly balanced so that you are unable to say on which side is the greater weight of the evidence, or if the greater weight of the evidence is in favor of the plaintiffs, then in any such event the defendant cannot recover from the plaintiff.

4.

During the course of the trial use has been made of the word "contract." A contract is frequently called an agreement. A contract is an agreement

between two or more persons to do or not to do some specific thing. Every sale and purchase of property are the result of a contract, the seller agreeing to sell and the purchaser to buy the property. In case of land, such contracts are ordinarily put in writing. Contracts for sale and purchase of personal property are sometimes put in writing, but not always. An oral contract for the sale of personal property may in law, if proved, be just as valid and enforceable as though it were written.

Contracts are of two general classes, express and implied. Express contracts are those in which the terms of the contract are openly and fully uttered and avowed at the time of making, such as to pay a stated price for certain specified goods or property. A contract is implied where there was not an express contract, but where there is circumstantial evidence otherwise that the parties did intend to make a contract. For instance, if one orders goods of a tradesman or employs a man to work for him, without the price or wages having been agreed upon in advance, the law raises an implied contract to pay the value of the goods or services.

In this case there is not sufficient evidence to show an express agreement between plaintiffs and defendant as to the price of the property which the plaintiffs claim to have sold and given into possession of defendant, and therefore as a matter of law there was no express contract between the parties. The question for your determination is, was there an implied contract, arising from

the circumstances of the case obligating the defendant to pay plaintiffs the reasonable value of the property. The plaintiffs say there was such an implied contract; the defendant says there was not.

So in this case if you find from all of the evidence and by a preponderance thereof, and under these instructions as to the law, that the plaintiffs on or about March 24, 1948, sold and delivered the property in question to the defendant and the defendant accepted said property and took possession thereof, the law implies a promise on the part of the defendant to pay the reasonable value of the property, that reasonable value to be determined by you from the evidence in the case, but in no event to exceed \$25,000.00.

5.

It appears that the property with which this action is concerned, referred to in the testimony and in these instructions as the Barry Arm property, was situated upon public domain. The law in such cases provides that one in possession of public land and making lawful use of the same is entitled to the possession of such property against all other persons who may seek to take possession thereof.

That rule applies not only to land above high tide but also to tide lands which are dry at low tide but covered by water at high tide. If you find in this case that the plaintiffs were in actual possession and use of any tide lands, then and in that event they were entitled to maintain possession

thereof as against all other claims or claimants seeking possession of such tide lands from the plaintiffs. Beyond and below the low tide mark and thence extending seaward, the rule is in most cases otherwise. As to the sea and arms and inlets of the sea below the low tide mark and thence extending seaward, and as to lands underlying the sea below the low tide line, as a general rule all persons have equal right to the lawful use thereof.

Hence, the plaintiffs had the lawful right to keep and maintain possession of the lands and tide lands possessed by them on and prior to March 24, 1948; and likewise the defendant had and has the lawful right to use unoccupied portions of the public domain and unoccupied tide lands, and possession of such areas by the defendant does not constitute any evidence of sale.

It should be noted that as respects tidelands, actual possession is necessary to establish superior right. Without actual possession all persons enjoy equal right to use thereof. Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings. But exclusive uninterrupted and long continued possession and use for other purposes may give such superior right, provided there is real and actual possession. But occasional use or even actual but temporary possession does not establish any special right other than that enjoyed by all citizens. Moreover, the possession of tidelands, in order to be valid, must be such as not to interfere with navigation or run counter to the laws relative to the fisheries.

5-A.

If you find from a preponderance of the evidence that the plaintiffs and defendant entered into an oral contract for the sale by the plaintiffs of the property in question to the defendant, and the purchase of the property by the defendant from the plaintiffs on or about March 24, 1948, and that the defendant thereupon accepted and received and took possession of said property, substantially as claimed in the plaintiffs' second amended complaint, and that there was there a sale and delivery of said property by the plaintiffs to the defendant and acceptance and receipt of said property by the defendant, then it is your duty to return a verdict in favor of the plaintiffs and against the defendant for the reasonable value of the property in such sum as you find the plaintiffs justly entitled to receive under the evidence given in this case, and under these instructions as to the law, but in no event to exceed the sum of \$25,000.00, which is the sum claimed by the plaintiffs to have been due them from the defendant.

But if the plaintiffs have failed to prove all and each part of their case as above outlined by a preponderance of the evidence, then it is equally your duty to bring in a verdict in favor of the defendant and against the plaintiffs, and you should consider whether or not the defendant is entitled to recover from the plaintiffs on the defendant's counterclaim; and if you find that the defendant has proved its counterclaim by a preponderance of

the evidence, you should return a verdict in favor of the defendant and against the plaintiffs accordingly.

6.

The laws of Alaska concerning sales of personal property provide in part as follows:

“A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.”

In this case there is no evidence of a note or memorandum in writing other than the agreement which was signed by the plaintiff Agostino in the latter part of June or the early part of July, 1948, and thereafter signed by Thomas A. Morgan as president of the defendant corporation. However the plaintiffs are not suing on that agreement. There is no evidence in this case that part payment of the property was made. Therefore, unless you find that on or about March 24, 1948, the defendant through its authorized agent or agents accepted part of the goods contracted to be sold and actually received the same, the plaintiffs are not entitled to recover in this action.

Under the laws of Alaska, the seller of personal

property warrants the title of the property sold unless other provision is made in the contract of sale. The law on the subject, so far as relevant to this case, reads as follows:

“In a contract of sale, unless a contrary intention appears, there is—

(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of sale;

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract of sale is made.”

* * *

“Where there is a breach of warranty by the seller, the buyer may, at his election— * * *

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. * * *

(4) (Liability for price or repayment.) Where

the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. * * *

(6) (Measure of damages.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.”

If you find from a preponderance of the evidence that the plaintiffs sold and delivered the Barry Arm property to the defendant on or about March 24, 1948, and that defendant then accepted and received said property or some part thereof, and if you further find that there was a breach of warranty by the sellers of said property, that is to say, by the plaintiffs in this action, under any of the provisions of the law above quoted whereby the plaintiffs warranted that they had then the right to sell the property, warranted that the buyer should have and enjoy quiet possession of the property, warranted that the property at the time of sale was free of any charge or encumbrance in favor of any third person not declared or known to the buyer at or before the date of the alleged sale, then the plaintiffs are liable to the defendant for the loss directly and naturally resulting in the ordinary course of events from such breach of warranty, and such loss, if any, should be deducted from the amount, if any, which you find the plaintiffs otherwise entitled to recover from the defendant in this action.

6-A.

Evidence has been received showing that in the latter part of June or the early part of July, 1948, the plaintiff Agostino signed an agreement for the sale of the property in question to the defendant, and that at some later date the agreement was signed by Thomas A. Morgan on behalf of the defendant corporation and as president thereof. As a matter of law, the evidence concerning the written agreement of late June or early July, 1948, and what transpired before and after with respect to said agreement, is not sufficient to constitute a bar to the enforcement of the alleged oral agreement, if any there was, for the sale of the Barry Arm property, which plaintiffs assert was entered into on or about March 24, 1948. But you may and should consider all of the evidence concerning said written agreement, and concerning the preceding discussions and negotiations and what followed thereafter, as bearing on the issue for your decision, and that is, whether or not on or about March 24, 1948, the plaintiffs sold and delivered the Barry Arm property to the defendant and the defendant accepted and received possession thereof. Regardless of the validity of the written contract of late June or early July, 1948, you may take all of the evidence concerning it into consideration in determining whether or not the plaintiff Agostino considered that he had sold the Barry Arm property to the defendant on or about March 24, 1948, as alleged in the plaintiffs' second amended complaint.

6-B.

If you find that the defendant in July or August, 1948, took possession of some of the Barry Arm property under and in reliance upon the written agreement which according to the testimony was signed by the plaintiff Agostino in late June or early July, 1948, and thereafter for the reasons and under the circumstances disclosed in the testimony given during trial of the case, returned the property to the place from which it was taken at the Barry Arm camp, such possession of the property by the defendant at that time can not rightly be deemed acceptance and receipt of said property by the defendant under the alleged oral contract for sale and purchase of the Barry Arm property which the plaintiffs claim was entered into on or about March 24, 1948.

6-C.

The plaintiff Bruno Agostino in his testimony referred to Kenneth D. Lambert as the superintendent of the logging operations of the defendant and as the foreman for the defendant. This testimony was evidently based upon hearsay and is now ordered stricken and you should not consider such testimony of the plaintiff Agostino as to the authority or position of Lambert for any purpose whatever.

The testimony of said Kenneth D. Lambert as to his relations with the defendant was properly given

and admitted in evidence and you may give such consideration to that testimony as you believe it is justly entitled to receive.

6-D.

Testimony has been received as to the status of Kenneth D. Lambert, sometimes referred to as Blackie Lambert, with respect to the defendant corporation. The defendant claims that from and after April 2, 1948, the said Kenneth D. Lambert was an independent logging contractor and was not an employee of the defendant and had no authority to speak for or represent the defendant in any manner whatsoever. An independent contractor unless specially authorized has no authority to bind the person, firm or corporation with whom he has contracted to furnish material or logs or any other goods or merchandise or to do any type of work. If you find that Lambert was an independent contractor during the period mentioned or any part thereof, then and in that event unless Lambert had express authority from the defendant to act for and in behalf of the defendant, the statements or promises of Lambert made while he was an independent contractor would not bind the defendant in any manner.

You are instructed that an independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods and without being subject to the control of his employer except as to the product or result of his work. One who contracts to do a

specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or according to a plan previously given to him by the person for whom the work is done with respect to details of the work, is an independent contractor. An independent contractor may be described as one who contracts to perform a piece of work at his own risk and cost, the workmen being his servants, being hired and fired by him. When the employer points out the end to be attained but not how it shall be done or who is to do it, the person undertaking to do the work is an independent contractor.

6-E.

Sometimes, in the trial of actions attempt is made to "impeach" a witness, or the witness is said to be "impeached." Impeach means to bring or throw discredit on, to call into question, to challenge. Hence a witness may be said to have been impeached when his testimony is discredited or his veracity challenged.

One way of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on another occasion. If it appears from the evidence that any witness has been impeached in this manner, you have a right to take that circumstance into consideration in determining his credibility and the weight of his testimony.

6-F.

Certain pleadings in two other actions brought in this Court have been introduced in evidence in this case. Such pleadings do not constitute evidence of the truth of the facts therein alleged, but you may take into consideration, in reaching your verdict, any admissions, if any, made by the plaintiffs in this action in those pleadings, or any allegations, if any, made in those pleadings by plaintiffs which are contrary to plaintiffs' evidence here produced.

6-G.

Plaintiffs in their reply allege "that if the Ellamar Packing Co. and the said Ray Grasser did take any of the property claimed to have been sold by the plaintiffs to the defendant, that the same was taken through a scheme and conspiracy brought about by the defendant for the purpose of cheating or defrauding these plaintiffs."

No evidence has been introduced in this case from which such an inference could reasonably be made and therefore, as a matter of law, you are instructed to disregard the above quoted portion of plaintiffs' reply.

7.

The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and

all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you may believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

8.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

9.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the

amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

10.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel so far as the same are based upon the evidence which you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But arguments of counsel if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

11.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case,

in order to agree with other jurors, it is nevertheless the duty of every juror, in considering the case with fellow jurors, to lay aside all undue pride or vanity of personal judgment, and to consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict; and to that end no juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

12.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

13.

Upon retiring to the jury room to consider your verdict, you will elect one of your number foreman who will speak for you and date and sign the verdict unanimously agreed upon. When you so retire you will take with you the pleadings in the case consisting of the plaintiffs' second amended complaint, the defendant's answer thereto, the plaintiffs' reply to the answer, the exhibits, these instructions and two forms of verdict.

If you find for the plaintiffs and against the defendant, you should use the form of verdict which has been prepared for that contingency and which is marked Verdict No. 1, and your foreman will insert therein the amount which you find the plaintiffs are entitled to recover from the defendant. The verdict should then be dated and signed by your foreman and returned into the Court as your verdict.

If you find for the defendant and against the plaintiffs, you will use the verdict which has been prepared for that contingency and which is marked Verdict No. 2, and your foreman will insert therein the amount, if any, which you find the defendant is entitled to recover from the plaintiffs, and your foreman will thereupon date and sign the same and you will return the same into Court as your verdict.

The verdict not used should be destroyed by your foreman.

You will return into Court with your verdict the pleadings, the exhibits and these instructions.

Dated at Anchorage, Alaska, this 7th day of June, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed July 6, 1949.

In the District Court for the Territory
of Alaska, Third Division
A-5207

BRUNO AGOSTINO and STANLEY SOCHA,
Co-partners Doing Business Under the Firm
Name and Style of BARRY ARM CAMP,
Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a Cor-
poration,

Defendant.

JUDGMENT

This cause having come on regularly for trial on the 31st day of May, 1949, the plaintiffs, Bruno Agostino and Stanley Socha, co-partners, doing business as Barry Arm Camp, plaintiffs, appeared in person and by their attorneys, Herman H. Ross and Bailey E. Bell, and the defendant, Columbia Lumber Company, Inc., a corporation, appeared by its president, Thomas Morgan, and by its attorneys of record, Robert Boochever and Edward V. Davis, each parties announced ready for trial, a jury was duly impaneled and sworn to try the issues in the

above-entitled case, and a true verdict render, the case being on trial until the 8th day of June, 1949, and all evidence having been adduced and submitted on behalf of both plaintiffs and defendant, and after argument by attorneys having been made, by the respective attorneys of the plaintiffs and the defendant, and the Court having instructed the jury as to the law; the said jury after due consideration, returned into Court, its verdict on the 8th day of June, 1949, which verdict is in words and figures, as follows, to wit:

In the District Court for the Territory
of Alaska, Third Division

No. A-5207

BRUNO AGOSTINO and STANLEY SOCHA,
Co-partners Doing Business Under the Firm
Name and Style of BARRY ARM CAMP,
Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a Cor-
poration,

Defendant.

Filed in the District Court, Territory of Alaska,
Third Division, June 8, 1949. M. E. S. Brunelle,
Clerk, By Louise Strahorn, Deputy.

Verdict No. 1

We the jury duly impaneled and sworn to try the

above-entitled cause do find for the plaintiffs and against the defendant and find that the plaintiffs are entitled to recover of and from the defendant the sum of Fourteen thousand ninety two dollars (\$14,092.00).

Dated at Anchorage, Alaska, this 8th day of June, 1949.

/s/ GEORGE KAROBELNIKOFF,
Foreman.

Entered Journal #G19, page #111, June 8, 1949.

Now, Therefore, after having heard and overruled the Motion for a New Trial, and on Motion of Bailey E. Bell of attorneys for the plaintiffs,

It Is Hereby Ordered and Adjudged, that the plaintiffs have judgment against the defendant in the sum of fourteen thousand and ninety two dollars (\$14,092.00) as principal, ~~together with interest thereon at the rate of six per cent (6%), per annum, from the 24th day of March, 1948, which amounts to, at this time, one thousand one hundred twenty seven dollars and thirty six cents (\$1127.36), or a total of fifteen thousand two hundred nineteen dollars and thirty-six cents, (\$15,219.36), together with a reasonable attorneys' fee, allowed and set by the Court in the sum of \$250.00, and for all costs and disbursements herein to be taxed by the Clerk of the Court, in the sum of \$....., for all of which, let execution issue.~~

Dated at Anchorage, Alaska, this 22 day of July, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered July 22, 1949.

Service of copy acknowledged.

[Endorsed]: Filed July 22, 1949.

CERTIFIED COPY

United States of America,
Third District of Alaska—ss.

I, M. E. S. Brunelle, Clerk of the United States District Court in and for the Third District of Alaska, do hereby certify that the annexed and foregoing is a true and full copy of the original Judgment, in cause No. A-5207, entitled Bruno Agostino and Stanley Socha, Co-partners doing business under the firm name and style of Barry Arm Camp, plaintiffs vs. Columbia Lumber Company, Inc., a Corporation, defendant, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Anchorage, Alaska, this 8th day of November, A.D., 1949.

M. E. S. BRUNELLE,
Clerk:

[Seal] By /s/ KATHRYN HOFF,
Deputy Clerk.

[Endorsed]: Filed Nov. 22, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That we, the undersigned, Columbia Lumber Company of Alaska, a corporation, as Principal, and Thomas A. Morgan, of Juneau, Alaska, and Harold L. Bliss, of Anchorage, Alaska, as Sureties, hereby acknowledge ourselves to be indebted and firmly bound to Bruno Agostino and Stanley Socha, doing business as Barry Arm Camp, plaintiffs hereinabove named, in the sum of Sixteen Thousand (\$16,000.00) Dollars, lawful money of the United States of America, for the payment of which sum well and truly to be made we bind ourselves, our heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and executed by the Columbia Lumber Company of Alaska, Principal, by Thomas A. Morgan, President, and by Thomas A. Morgan, individually, as one of the Sureties, at Juneau, Alaska, this 22nd day of August, 1949.

Signed, sealed and executed by Harold L. Bliss, one of the Sureties, at Anchorage, Alaska, this 29th day of August, 1949.

The condition of this obligation is such that,

Whereas, the Columbia Lumber Company of Alaska, a corporation, is appealing to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment rendered, made and entered in the above-entitled Court and cause

on the 22nd day of July, 1949, wherein and whereby it is ordered, adjudged and decreed that Bruno Agostino and Stanley Socha, doing business as the Barry Arm Camp, plaintiffs above-named, have and recover from the defendant, Columbia Lumber Company of Alaska, a corporation, the sum of \$14,-092.00, and the further sum of \$250.00 as attorneys' fees, together with costs.

Now, Therefore, if the said Columbia Lumber Company of Alaska, a corporation, shall prosecute its appeal to effect and shall pay the judgment in full, together with costs, interests and damages for delay, or for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of judgment and such costs, interests and damages as the Appellate Court may adjudge and award, then this obligation to be void, otherwise to be and remain in full force and effect and to be enforceable against the above bounden sureties under and in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure.

In Witness Whereof, the parties hereto have hereunto set their hands and seals on the dates hereinabove set forth.

COLUMBIA LUMBER

COMPANY OF ALASKA,

A Corporation, Principal.

By /s/ THOS. A. MORGAN,

President.

[Seal] /s/ THOS. A. MORGAN,
 Surety.

[Seal] /s/ HAROLD L. BLISS,
 Surety.

United States of America,
Territory of Alaska—ss.

I, Thomas A. Morgan, the undersigned, whose name is subscribed to the foregoing bond as surety, being first duly sworn, depose and say:

That I am a resident of the Juneau Precinct, Territory of Alaska, and that I am not an attorney nor counsellor at law, Clerk of any Court, Marshal, Deputy Marshal, or other officer of any Court, and that I am worth the sum of Sixteen Thousand (\$16,000.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

/s/ THOS. A. MORGAN.

Subscribed and sworn to before me this 22nd day of August, 1949.

[Seal] /s/ S. P. FREEMAN,
 Notary Public in and for
 Alaska.

My commission expires: 4-26-53.

United States of America,
Territory of Alaska—ss.

I, Harold L. Bliss, the undersigned, whose name is subscribed to the foregoing bond as Surety, being first duly sworn, depose and say:

That I am a resident of the Anchorage Precinct, Territory of Alaska, and that I am not an attorney nor counsellor at law, Clerk of any Court, Marshal, Deputy Marshal, or other officer of any Court, and that I am worth the sum of Sixteen Thousand (\$16,000.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

/s/ HAROLD L. BLISS.

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ J. L. McCARREY, JR.,
Notary Public in and for
Alaska.

My commission expires 4-25-50.

Received but not yet approved by plaintiffs, this 31st day of August, 1949.

/s/ HERMAN H. ROSS,
Of Counsel for Plaintiffs.

ORDER

Now on this day, it is hereby ordered that the foregoing bond on appeal be and it is approved as to amount and sufficiency of surety; and

It is further ordered that said bond shall operate as a supersedeas bond from the date of the filing thereof herein.

Done in open Court this 12th day of August, 1949.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed August 31, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Come now the above-named plaintiffs, and notify the defendant, and all parties interested, that they intend to appeal from the judgment rendered herein, on the 22nd day of July, 1949, insofar as, and no further, than the Court's denial and refusal to grant them interest on the account sued on, from the 24th day of March, 1948, and from the Court's refusal to grant the plaintiffs an adequate and reasonable attorney's fee to compensate plaintiffs, as by law provided in the Territory of Alaska.

The names and addresses of the plaintiffs are: Bruno Agostino, Box 95, Homer, Alaska, and Stanley Socha, 125 Sixth Street, Anchorage, Alaska; the names and addresses of the plaintiffs' attorneys are: Herman H. Ross and Bailey E. Bell, Central Building, Anchorage, Alaska. The name and address of the appellee is: Columbia Lumber Company, Inc., Anchorage, Alaska; and the attorneys of record for the appellee are: Davis and Renfrew, J. L. McCarrey, Jr., of Anchorage, Alaska, and Robert Boochever of Juneau, Alaska.

The action is one for the recovery of money on account for property had and received, and not paid for.

Plaintiffs in the Court below relied upon, and now contend that they have a right to recover a sum for reasonable attorney's fee as provided by Section 55-11-55 of the Alaska Compiled Laws Annotated, 1949, and Section 25-1-1 Alaska Compiled Laws Annotated 1949, as to interest.

The trial court erred in not granting plaintiffs interest on the sum that the jury found due the plaintiffs from the defendant since there was no controversy as to the date the money became due, and plaintiffs should have been allowed six per cent (6%) interest from that date until paid.

That the trial court erred in granting the plaintiffs only two hundred fifty dollars (\$250.00) attorneys' fees when the record before the Court showed services rendered by two attorneys on behalf of the plaintiffs for more than twenty eight days, and that if the plaintiffs were entitled to an attorneys' fee at all, they would be entitled to an attorney's fee that was adequate, and that an adequate attorneys' fee would be at least three thousand five hundred dollars (\$3500.00).

You, the said Columbia Lumber Co., Inc., a corporation, and Davis and Renfrew, J. L. McCarrey, Jr., and Robert Boochever, defendant's attorneys of record, are hereby notified that the plaintiffs will appeal the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit setting in San Francisco, California, on all of

the grounds above set forth, and such other grounds and exceptions as are contained in the record.

/s/ BAILEY E. BELL,

/s/ HERMAN H. ROSS,

Attorneys for Plaintiffs.

Service of the foregoing Notice of Appeal is hereby admitted on this 22nd day of August, 1949.

COLUMBIA LUMBER CO.,
INC.

By /s/ J. L. McCARREY, JR.,

Of Attorneys of Record.

[Endorsed]: Filed August 22, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Columbia Lumber Company of Alaska, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on July 22, 1949.

FAULKNER, BANFIELD &
BOOCHEVER.

/s/ J. L. McCARREY, JR.,

Attorneys for Appellant Columbia Lumber Company of Alaska.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 22, 1949.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME

Comes now the defendant and moves the Court to grant an extension of time of an additional forty days within which the defendant may file herein the transcript of record, designation of record relied upon, and statement of points relied upon in the appeal of the above-entitled action to the United States Court of Appeals for the Ninth Circuit.

This motion is made for the reason that the official Court Reporter has been unable to prepare said record and has advised the defendant that said record will be completed about October 23, 1949.

Dated this 28th day of September, 1949.

FAULKNER, BANFIELD &
BOOCHEVER,

J. L. McCARREY, JR.,
DAVIS & RENFREW,

Attorneys for Defendant.

By /s/ J. L. McCARREY, JR.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 29, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter having come on for hearing upon the motion of defendant for an extension of time of an additional forty days to file the transcript of record, defendant's designation of record on appeal, and defendant's statement of points relied upon on appeal, and it appearing to the Court that the transcript of record cannot be completed and filed within the time specified in the Rules,

Now, Therefore, It Is Hereby Ordered that the defendant be, and it is, hereby granted until October 27, 1949, within which to file herein the transcript of record on appeal, the designation of record on appeal, and the statement of points relied upon by the defendant on appeal to the United States Court of Appeals for the Ninth Circuit.

Done in open Court this 7th day of October, 1949.

/s/ ANTHONY J. DIMOND.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered October 7, 1949.

In the District Court for the Territory of
Alaska, Third Division
No. A-5207

BRUNO AGOSTINO and STANLEY SOCHA,
Co-partners Doing Business Under the Firm
Name and Style of BARRY ARM CAMP,
Plaintiffs,

vs.

COLUMBIA LUMBER COMPANY, INC., a Cor-
poration,
Defendant.

PROCEEDINGS

Tuesday, May 31, 1949

Before: The Honorable Anthony J. Dimond,
United States District Judge.

Appearances:

HERMAN H. ROSS,

BAILEY E. BELL,

Appearing for Plaintiffs.

R. BOOCHEVER,

EDWARD V. DAVIS,

Appearing for Defendant.

(Whereupon, at 2:30 p.m., the above-entitled
matter came on for taking of testimony upon
completion of selection of Jury.) [1-2*]

The Court: This is the time set for trial of the

* Page numbering appearing at top of page of original Reporter's
Transcript.

case of Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, plaintiffs, against Columbia Lumber Company, Inc. Are the plaintiffs ready?

Mr. Bell: Oh, yes, we are ready.

The Court: Is the defendant ready?

Mr. Boochever: Yes, Your Honor. At this time I would like to move to have Mr. Davis associated with me in this action.

The Court: Record will so show.

(Selection of members of the jury were had.)

The Court: Counsel for plaintiff may make an opening statement to the jury.

(Plaintiff's opening statement was made by Mr. Ross.)

The Court: Counsel for defendant may make an opening statement to the jury.

(Defendant's opening statement was made by Mr. Boochever.)

The Court: The Court will stand in recess until three o'clock.

(Short recess.)

The Court: Without objection the record will show all members of the jury present.

Mr. Boochever: I would like to make two short motions at this time, possibly one of them should be made in the absence of the jury. [3]

The Court: Jury may retire to the jury room.

Mr. Boochever: Your Honor, the first motion is in regard to the pleadings, the amended com-

plaint of the plaintiffs, part of it was stricken, one of the causes of action. Now, I haven't been here in Anchorage, but I believe that a new amended pleading was never filed omitting that one cause of action. Am I correct in that, Mr. Bell?

Mr. Bell: I don't remember.

The Court: I am quite sure that is right. I looked at the file yesterday.

Mr. Boochever: I would like to move that the plaintiffs file a second amended complaint omitting that one cause of action and the rest of the pleadings remain the same, which would take care of it because otherwise the jury would have that old cause of action before them. Even if it were x'd out it would still be there before them and it is still contrary to our Code law.

Mr. Bell: Your Honor, when that motion was sustained, immediately following that the answer was filed and there never was any order made to do that but if Your Honor wants me to I will be glad to put that in tonight or in the morning.

The Court: As long as the point is raised, I think it is of no consequence but it may be and as long as the point is raised, why I think it would be better for counsel to file a [4] second amended complaint and omit the second cause of action which was stricken and then the answer may be considered as the answer to the second amended complaint.

Mr. Boochever: Thank you, Your Honor. The other motion we would like to make at this time

is a motion to exclude the witnesses which will appear in this case with the exception of the parties, including the president of the defendant company.

The Court: All of the witnesses with the exception of the plaintiffs and the president of the defendant corporation will be excluded from the court room during the trial of the case, and they may await for call in the witness room, room 141, which is almost directly across the hall to my right, room 141. I shall request counsel to keep watch of the court room to be sure that no witnesses inadvertently without knowledge of this order come in and remain here. Sometimes witnesses do not know of the order and they sit in the court room and hear some of the testimony contrary to the provisions of the order.

Without objection the record will show all members of the jury present. Witness may be called on behalf of the plaintiffs.

Mr. Bell: Mr. Agostino.

BRUNO AGOSTINO

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bell:

Q. State your name?

A. Bruno Agostino.

Q. How old are you, Bruno?

A. 71 years old.

(Testimony of Bruno Agostino.)

Q. Now, where do you live?

A. I live in Anchorage right now.

Q. You live in Anchorage? A. Yes.

Q. How long have you lived in Alaska?

A. Oh, since 1916 I have been living in Alaska.

Q. What did you do during the years of 1944, '45, '46 and '47?

A. I was engaged in logging camp in Barry Arm.

Q. Did you have a partner in that business?

A. Yes, my partner, Stanley Socha.

Q. Was he and you the sole and only owners of Barry Arm at the time in March of 1948?

A. That is true.

Q. Now, how many years did you work down there?

A. Well, better than three year, I wouldn't say, about three years and one half.

Q. Did you build any buildings there?

A. Yes, we built several buildings. We build two nice buildings, that is what we call the cook-house and the bunkhouse. It [6] is all combined. That is one building together.

Q. The dimensions, I believe you stated, were 24 feet by 30 feet? A. Yes.

Q. Now, what is that built of, Bruno?

A. Well, I couldn't give you exact figures. We say it cost in labor because the logs cost nothing. At least cost about \$3000.

Q. For your labor? A. Just for labor.

(Testimony of Bruno Agostino.)

Q. You didn't understand me, Bruno, what is it built out of? A. What?

Q. What did you build it of?

(No response.)

Q. What did you build it of, did you build it of logs?

A. Yes, built it of logs except the roofs and windows and the floor and partitions, that is lumber, that is frame inside.

Q. Do you have hot and cold water in the place?

A. Yes, we have a water system.

Q. It is modern in every way, is it?

A. Yes.

Q. What other buildings did you build there?

A. Well, they got garage for two cats. They is 18 by 24. That is all-frame building.

Q. That is a frame building? A. Yes. [7]

Q. Now, what else did you have there, Bruno?

A. Well, we had a D-7, D-8 cats and a donkey and lots of what we need, we have 24,000 feet of cable, blocks, well, I cannot remember everything I have, I haven't a list.

Q. Do you have a, what is called a "donkey engine"? A. Yes.

Q. Was that all equipped for operation?

A. Yes.

Q. Did you have a sawmill that you have moved in there?

A. Sawmill, the only machine need to attach it was a belt; it was complete setup.

(Testimony of Bruno Agostino.)

Q. Had you done all that during the three and one-half years that you had operated there?

A. Yes, sir.

Q. Now, Bruno, during the time you were working there or operating, did you sell logs to the various people?

A. We sell log to Columbia Lumber Company and we sell log to the Elemar and to the Nellie Wand.

Q. And you sold logs generally to the people who came for them? A. Yes.

Q. And how many different times had you sold lots of logs or rafts of logs, we will say, to the Columbia Lumber Company?

A. Well, I don't know how many time, but every time that we have a raft they come in and get it. We just tell them and they come in and get it. [8]

Q. Now, who would come down there as a general rule?

A. Several time they come in—Mr. George Morgan.

Q. Wait, a little slower. Who? A little slower.

A. George Morgan.

Q. Was that the gentleman sitting over there?

A. He has come in last of May, 1948, on my last raft.

Q. It was May, 1948? A. Yes, sir.

Q. And this gentleman sitting here was there?

A. Yes, that is Mr. Tom Morgan.

Q. Is that Tom Morgan? A. Yes.

(Testimony of Bruno Agostino.)

Q. Now, who is George Morgan?

A. That is his brother.

Q. Now, do you know what relation this gentleman sitting here has with the Columbia Lumber?

A. They are supposed to be a president, a general manager of the company.

Q. President and general manager?

A. Yes.

Q. I will ask you to give us more detail on what you had on the grounds there, say, in March of 1948, you had the cookhouse—I will repeat the things you have described—the cookhouse and the garage and two cats, I believe you stated. Now, cats, you mean by that caterpillars? [9]

A. Caterpillar D-7 and D-8, they call it.

Q. D-7 and a D-8? A. Yes, big cats.

Q. And you had a sawmill, you stated?

A. Yes.

Q. Now, you refer to it in your list here as a sled, will you explain to the jury what a sled is, what is meant by that?

Mr. Boochever: Your Honor, I must object to his leading the witness and referring to a list which isn't in evidence.

The Court: If the witness needs a list to refresh his memory he may see it. Can you read English?

The Witness: Yes, Your Honor.

Mr. Bell: Now, just in your own words, tell the jury what you had there in March of 1948?

Mr. Boochever: Excuse me, Your Honor, I hes-

(Testimony of Bruno Agostino.)

itate to interpose again but I think if the witness is going to use a list he should state where he made it and so forth so it is identified.

The Court: The objection is overruled. I think the witness can refresh his recollection; counsel can examine the memorandum if he wants to and cross-examine upon it. Overruled. And in this case as in every case, exceptions are deemed to be taken as of course to all adverse rulings but that does not preclude counsel from voicing exceptions on every occasion that counsel so desires. You may proceed, Mr. Agostino.

The Witness: This sled you mention—this sled, that is [10] what the donkey is sitting on to pull it through the woods. Then they got another sled that they use to call it a carrier this oil barrel to the donkey to the cats through the woods and pull by another cats, that would be about 6 feet wide and 12 feet long, but the donkey sled it is about 30 feet long and it is the width of the donkey—about 8 feet wide.

Q. (By Mr. Bell): About 8 feet wide and 30 feet long? A. That is on the donkey.

Q. And the other sled?

A. It is 6 by 12.

Q. Go ahead and look on the list there and explain to the jury what each of those things were?

A. Well, you mean what it cost?

A. No, tell them what you had there at the time?

(Testimony of Bruno Agostino.)

You had the donkey and the caterpillars and the houses, just tell them everything.

A. Yes, I have two cats, one sawmill, one light plant, one drill press, two vice, one handle, an old miscellaneous tools, blocks.

Q. Mr. Agostino, that is my handwriting, is it not, that you are reading from? A. Yes.

Q. I wrote that, did I not, in your presence?

A. Some of this I don't understand what you mean.

Q. Mr. Agostino, you told me that list and I made it out in my handwriting, didn't it? [11]

The Court: I think you had better take the list, counsel, it doesn't seem to be of much help.

Mr. Bell: He doesn't seem to read my terrible handwriting. Now, was the bunkhouse furnished?

A. Well, it is partly furnished.

Q. What did it have?

A. About 8 bed in there, springs and mattresses, no blankets.

Q. 8 beds and springs and mattresses and no blankets?

A. No blankets. We have a cook stove—oil stove—and the hot water tank, and all the dishes for about 12 men.

Q. Did it have pots and pans and everything there?

A. Yes, it was complete for a bunch of men, about 12 men.

Q. Now, what about the trap logs or logs that

(Testimony of Bruno Agostino.)

you had there at the place for booming or grouping your timber, explain that to them, Bruno?

A. Trap log, that is a log that go to the fish canneries.

Q. I have asked you wrong, I mean boom logs?

A. Boom logs was there right there on the boom. The boom was cut off by some storm, that is.

Q. Go ahead and tell after the storm cut the boom, did you take the logs inside?

A. No, I left it right there. They was there when the Columbia Lumber Company move in. They come in to get it.

Q. Where were they? A. In the pond.

Q. In the pond? A. Yes.

Q. Now, did you have chains to connect those logs? A. Yes, we had a chain there.

Q. About how many of those boom logs did you have there?

A. Oh, 17, 18 or more, I don't remember exact number.

Q. Now, how much more timber had you bought from the Government that you had not yet cut at the time you sold out?

A. On October 1st I bought the last permit, that was 250,000 feet.

Q. Do you remember how you paid for that, Bruno? A. Yes.

Q. What year was that, October of what year?

A. 1947.

Q. Did you pay for that with a check?

(Testimony of Bruno Agostino.)

A. I paid by check. I give it to one of the men and he took it to Juneau and gave it to the Treasury of the United States.

Q. Did you later receive that check back through your bank? A. Yes, I got the check back.

Q. In other words the check was the check paid through your bank afterwards? A. Yes.

Mr. Bell: Your Honor, I would like to have this marked.

The Court: It may be marked for identification as Plaintiffs' Exhibit 1. [13]

Q. (By Mr. Bell): Mr. Agostino, I hand you a check that has been marked Plaintiffs' Exhibit 1 and I will ask you to state, if you know, what that is?

A. Yes, this is in payment for 250,000 feet timber to the U. S. Government.

Q. Who signed that check?

A. I signed the check. It is my name here.

Q. Did you get it back from the bank after it was cleared? A. Yes, sir, Bank of Alaska.

Q. And is it now in the same condition as it was then save and except for the identification stamp the Clerk just put on it? A. Yes.

Mr. Bell: We now offer it in evidence.

The Court: It may be shown to counsel.

Mr. Boochever: Your Honor, we object to it being incompetent and irrelevant. The pleading shows any timber contract the plaintiff had in 1947 and they are pleading on a 1948 agreement.

(Testimony of Bruno Agostino.)

The Court: Objection may be overruled. It may be admitted and read to the jury.

Mr. Bell: Bank of Alaska. "Alaska's Branch Banking System." Anchorage, Alaska, October 31, 1947. Pay to the order of the Treasury of the United States \$250.00. And in [14] writing Two-hundred fifty and no/100reths dollars. Signed Bruno Ogostino and is stamped on the back Pay to the order of the First National Bank, Juneau, Alaska for credit to the United States of America, Forest Service, Juneau, Alaska. And then it has another stamp Pay to the order of any bank or banker. All prior endorsements guaranteed. First National Bank, Anchorage Alaska.

Q. Mr. Agostino, what did that payment represent?

A. It represented the right to go ahead and cut the timbers according to the Government rules.

Q. Then after you paid that on October 31, 1948 had you cut any of that timber up to the that you turned the place over to the Columbia Lumber Company?

A. No, October 31st, that is pretty near the middle of winter. The season started cutting in May.

Q. In other words, I wanted to get it clear, that was in October, you didn't cut any more that fall?

A. No.

Q. That was an advance payment then for timber that you were going to cut in 1948?

A. Yes.

(Testimony of Bruno Agostino.)

Mr. Davis: Your Honor, Mr. Bell should be admonished about leading the witness; he should let the witness testify for himself.

The Court: Objection is sustained. [15]

Q. (By Mr. Bell): Now, Mr. Agostino, after that did you live there during the winter?

A. Yes.

Q. About what date did you see anyone connected with the Columbia Lumber Company after October 31, 1947?

A. Well, that is in March Mr. Lambert he came there with his scow and his machinery and I stop him.

Q. Now, talk a little slower so they can understand you. That was in March, you say?

A. March, 1948.

Q. What was that fellow's name?

A. Blacky Lambert.

Q. Blacky Lambert?

A. Yes, superintendent of the logging camp for the Columbia Lumber Company.

Mr. Boochever: Your Honor, I move that that last part is a conclusion of the witness as to whether he was a superintendent of the logging company of Columbia Lumber and move that that be stricken.

The Court: Motion is denied.

Q. (By Mr. Bell): Was this Blacky Lambert that you refer to, is that the same as Kenneth D. Lambert? A. Yes. [16]

Q. It is the same man? A. Same man.

(Testimony of Bruno Agostino.)

Q. Now, then, will you please tell the jury if you had a conversation with this Kenneth D. Lambert at that time?

A. First time we had a conversation he wanted to land there and I told him if I let him land there it will stop me, block me, I couldn't operate it. So they went back and they came back in a week time, back to my camp again.

Q. Now, before you tell about that, tell the jury how you operated in the mouth of Mosquito Creek? Tell the jury how you worked there, how you gathered your logs?

A. Mosquito Creek is another channel. It is too small for two outfits, for just one outfit. You have to put logs and block them in the channel and make a raft in there and let them out and a bigger boat to take away—bigger boat to come there and pull it out.

Q. How wide is Mosquito Creek normally?

A. Normally when the tide is out in about 18 to 20 wide.

Q. 18 to 20 feet wide? A. Yes.

Q. Now, then, when it is high tide and the tide is in, how wide is it?

A. Maybe 400 feet wide and there is 20 feet of water.

Q. And 20 foot deep, you mean?

A. In the channel of the creek. Maybe on the side maybe it [17] is ten feet high—deep.

Q. Tell the jury how you operated, how you

(Testimony of Bruno Agostino.)

held the logs in there at the mouth of Mosquito Creek?

A. We put in a boom in there and chain it one log to the other and put the other logs and raft and when they are ready let them out to take it.

Q. Now, do I understand you chain the logs together? A. Yes.

Q. That is what is called a boom? You put—

A. You put all the logs inside that boom and then they pull them out.

Q. Had you been operating that way ever since you went there? A. Yes.

Q. When you had your log—your boom in there could anyone else get in and out? A. No, sir.

Q. And if anyone else had a boom in there could you get in and out?

A. No, just enough for one boom—one raft.

Q. Now, how much timber had you cut over—how many acres of timber had you cut over prior to March of 1948?

A. I don't remember that. We got four permits. Last permit never been touched. Three permits we take out. Let's see, three permits make 750,000.

Q. You had taken out 750,000 board feet? [18]

A. Yes.

Q. And you had a permit for 250,000 more?

A. More.

Q. Mr. Agostino, I hand you a paper that has been marked for identification No. 2—Plaintiff's

(Testimony of Bruno Agostino.)

Identification No. 2—and I will ask you to state what that is?

A. Yes, this is the map. It is how the country look over there.

Q. Who drew that? A. I draw that.

Q. Is that a fair likeness of the conditions as they were at the time? A. Yes.

Q. Is that a fair map of the actual surroundings?

A. That is the way it look of the country over there.

Q. Does that show your building and improvements? A. Yes.

Q. Does it show the logging woods that you had cut over and the one that you had purchased to cut over? A. Yes, it shows the blocks, yes.

Q. Now, as far as you are able to do it, that is a correct map of conditions as they existed there in March, 1948? A. Yes.

Mr. Bell: I now offer it in evidence.

Mr. Davis: Your Honor, it will take a few minutes to look [19] at this, might we have a little recess?

The Court: Court will stand in recess for five minutes.

(Short recess.)

The Court: Without objection the record will show the counsel for plaintiff has marked in identification a map.

Mr. Davis: Constituting what?

(Testimony of Bruno Agostino.)

The Court: It is my understanding that it is a map, not accurate nor drawn to scale, but it is offered according to my understanding merely to illustrate the testimony of the witness.

Mr. Davis: We have no objection to it for that purpose.

The Court: It may be admitted and marked as Plaintiffs' Exhibit 2.

The record will show all members of the jury present.

Q. (By Mr. Bell): Mr. Agostino, will you come down here in the presence of the jury and take the butt end of this pencil so it will not mark. Now, Mr. Agostino, please point to your bunkhouse building as shown there?

A. That is the bunkhouse right there.

Q. Now, then, will you please point to the garage building?

A. That is the garage right there.

Q. Now, will you please explain to the jury where the mouth of Mosquito Creek is?

A. Here is the mouth of Mosquito Creek. [20]

Q. About what distance is it from your bunkhouse to the mouth of Mosquito Creek?

A. About a thousand feet.

Q. And about how far is it from the garage building to the mouth of Mosquito Creek?

A. It is, say, 980 feet because the garage is only 20 feet—about 25 feet from the bunkhouse.

Q. Now, would you please point to the part of

(Testimony of Bruno Agostino.)

the timber lands that you have cut over, already took the timber off?

A. That is Forest Permit No. 1; that is second permit that is cut off; and that is the third one. This is the one I bought on October 31st that never has been touched, 250,000 feet on that of logs.

Q. Now, did I understand you that the one you pointed to up higher was the one you bought in October, 1947? A. '47.

Q. Is that the one the check represents that you introduced in evidence?

A. Yes, I introduced because this has never been touched.

Q. Now, Mr. Agostino, have you drawn on there anything else other than the matters I have mentioned to you? A. Well, I draw the sawmill.

Q. Now, show the jury where the sawmill was?

A. There is the sawmill.

Q. Did you draw the donkey with the lines? [21]

A. No. No, I haven't.

Q. Will you please explain to the jury what the red lines represent where your pointer is?

A. Red line represent road that cat that go through here. That is the road that go into the garage and come in here and go around here to the pond where the waters are high. We can't go through there and we take the cutoff here and we go around to the pond and up to the timber and put the timber into the pond over here. All the red line that is the road we went through with

(Testimony of Bruno Agostino.)

the cat. We leveled it up so we could go through.

Q. Who built those roads?

A. We built that road with a D-8 with a blade.

Q. Yourself and Stanley Socha, who is your partner? A. Yes.

Q. Had those roads all been built prior to March, 1948—before March, 1948?

A. This have been a complete by 1948 but we started since 1944-45.

Q. You built them from 1944 up to 1948?

A. Yes, when we reach in there that was 1948.

Q. Did Mr. Blacky Lambert see those roads when he was there? A. Yes, he used it, too.

Q. He used them? A. (No response.)

Q. Did he see all of those things there when he came to see you? [22]

A. Yes, I gave him possession to all of these things.

Q. That will be all, then. We will roll the board back. You can take the stand again now. Now on the third trip that you have referred to that Mr. Lambert, superintendent for the defendant company, came to see you, did you give him possession of everything at that time?

Mr. Davis: Now, Your Honor, I object to this question for several reasons, in the first place there isn't any evidence at all that Mr. Lambert was the superintendent for Columbia Lumber; and in the second place, if I remember the evidence rightly, Mr. Agostino hasn't testified to any third

(Testimony of Bruno Agostino.)

trip; in the third place, Mr. Bell, in asking him if he gave possession of all these things, is leading the witness.

The Court: Objection is sustained.

Mr. Bell: I am just repeating what the witness said. He said he gave him possession of those things.

Mr. Davis: I think he did that without the rest.

Mr. Bell: I was having him fix the time. Your Honor, Mr. Agostino has testified that Lambert was superintendent for the Columbia—

The Court: He made a description of that; I suppose it might be considered testimony.

Q. (By Mr. Bell): Now, Mr. Agostino, have you told us about the third trip when Lambert came back, did you tell us that? [23]

A. Well, Your Honor, the second time—I don't tell you the second time yet.

Q. Tell me about the second trip?

A. When he came second trip he said that he had a letter from the Columbia Lumber Company to moving them—

Mr. Boochever: Object to anything Mr. Lambert said as hearsay.

The Court: Overruled.

Mr. Davis: I think, Your Honor, it is necessary before any testimony be brought in he be shown to be an agent of some kind not merely that he is an agent of the superintendent.

The Court: Overruled.

The Witness: He show me a letter to come from

(Testimony of Bruno Agostino.)

Columbia to move into that pond and I told him "You can't move here." The telegram came from Juneau and it——

Q. (By Mr. Bell): What did the telegram say?

A. The telegram——

Mr. Boochever: I must object. That is not the best evidence. The telegram itself is the best evidence.

The Court: Have you got the telegram?

The Witness: Mr. Lambert has the telegram. I gave it to him to call Mr. Morgan.

The Court: Is Mr. Lambert your witness in this case?

Mr. Bell: We will have Mr. Lambert [24] here.

The Court: Objection is well taken.

Mr. Bell: Your Honor, to save time while he is talking to Mr. Lambert, he has been subpoenaed here.

Q. You say you gave him the telegram or did he give you——

A. He show it to me and he said he would go talk to Mr. Morgan and he take the telegram to him and he take it back to him. It was just to show to me.

Q. Who? A. Mr. Lambert.

Q. I understand now, to get it clear, Mr. Davis, he showed you the telegram? A. Yes.

Q. You read it and gave it back to Blacky?

A. To Mr. Lambert.

Q. Now, then, what happened after that?

(Testimony of Bruno Agostino.)

A. Well, he went to call Mr. Morgan on long-distance telephone and he told him that the only way to land——

Q. You can't tell what he told. Now, he did go away then to call Mr. Morgan? A. Yes.

Q. Now, then, when did you next see Lambert?

A. I—next time was about the 21st of March—24th of March.

Q. Now, then, how did he come to your place at that time? A. He came with a boat.

Q. And do you know who was with him when he came? [25]

A. Well, most of the time Mr. Griffen—Cliffend.

Q. Now, was that the time—was that the first trip you say he came he had this man with him?

A. Right.

Q. When he came back the second time who came with him? A. Ted Rowell.

Q. Who else came besides Ted Rowell and Mr. Lambert? A. Nobody else, them two.

Q. And they were in a boat?

A. The other fellows stay on the boat and I don't see them.

Q. What kind of a boat was it?

A. Well, that is a kind—small steamboat. It is travelled by gas engine—a bigger gas engine—I wouldn't say what kind of boat, a pretty good sized boat because it pulled the raft.

Q. It was one that they pulled rafts with?

(Testimony of Bruno Agostino.)

A. Yes, it was working for the Columbia Lumber Company.

Q. Then the third time that he came who came with him?

A. Well, Mr. Lambert and Mr. Ted Rowell that came together and they told me that Mr. Morgan come on the 10th of April and settle with me.

Q. Up to that time had you talked to Mr. Morgan personally about the sale of the property?

A. You mean on the 10th of April?

Q. No, I mean on the 24th of March. [26]

A. That is Mr. Lambert who did all the talking.

Q. Mr. Lambert did all the talking and you talked to him?

A. And I talked to Mr. Lambert.

Q. Now, did you and Mr. Lambert discuss the price that was to be paid for your holdings there?

A. Yes.

Q. Now what was the price to be paid for your holdings?

Mr. Boochever: Object to that; there is no showing that Mr. Lambert had any authority at all in this case to make any representations on behalf of the defendant and it is completely irrelevant what conversations were had in that connection.

The Court: The whole case cannot go in at once and for that reason the objection is overruled. Ladies and gentlemen, you are instructed that unless it is shown at sometime that Lambert had authority to represent the Columbia Lumber Company the

(Testimony of Bruno Agostino.)

Columbia Lumber Company isn't represented at all. I am admitting it because we must make such progress as we can in the trial of the case.

Mr. Boochever: I would want for the record to add a further objection that it is not the best evidence in that a subsequent written contract was entered into between Columbia Lumber and Mr. Agostino embodying the same property and that is the best evidence and the Parole Evidence Rule prevents the introduction of any—The defendant denied the oral contract in March.

The Court: Objection is overruled. [27]

Q. (By Mr. Bell): On the other trips, the conversations between you and Blacky was concerning the price, is that right? A. Yes.

Q. Now, then, what did you tell him you would take for your property?

A. I told him that the price is \$25,000—\$19,000 for the machinery and \$6,000 for the rest of the building and cable and things that we have in there, blocks, all material that we had.

Q. Mr. Agostino, were you familiar with the value of your equipment there at that time?

A. Well, I wasn't familiar because we pay that much money for it.

Q. You had bought it yourself and built it yourself?

A. Yes, and we had paid for the machinery. I sell for the same price that I pay it.

Q. And you had paid that amount of \$25,000?

(Testimony of Bruno Agostino.)

A. Yes.

Q. Now, then, when Blacky came back the third time, did he bring someone with him?

A. They bring Mr. Ted Rowell and he said that he speak of a Mr. Morgan long-distance telephone and he told what I said in my price.

Mr. Davis: Your Honor, for the sake of the record we would [28] like to make another objection.

The Court: Objection is overruled.

Q. (By Mr. Bell): Go ahead?

A. He had set the price and he said they are going to be up on the 10th of April and settle with me and he did come on the 10th of April and give order to his officer to start my cat and see how they go and he came back in two days. Mr. Morgan never came back.

Q. He did come back on the 10th of April?

A. Yes, and talked to me and talked to that officer—to Mr. Blacky and Mr. Ted Rowell who was there too.

Q. And did they start the cats up at that time?

A. Yes, they started the cat but Mr. Morgan was not there when they started the cat. He just gave the order to start the cat and he go and say "I come back in two days" and Mr. Morgan never come back.

Q. Did he pay you anything?

A. Never paid me a red penny yet.

Q. What did you do then after Mr. Morgan

(Testimony of Bruno Agostino.)

came there and told the men to start the cats, what did you do?

A. Well, I don't do nothing. But I gave him possession, what else I could do? I just stayed there and waited for Mr. Morgan and Mr. Morgan didn't come and I come into town here.

Q. What did you do in giving him possession?

A. By letting him land and tell them to use all my machinery and my bunkhouse—everything I have in there—and my timber.

Q. Did they land there?

A. Yes, he landed there.

Q. Did he start operations?

A. Well, they don't start operation at the present time because he was too much, but they straighten up their machinery and run into my garage and get whatever they need, back and forth for pretty near a month, before they go through the woods—go through my pond to cut the timber down.

Q. In other words, if I understand you right, they were there about a month before they actually started cutting timber? . A. Yes.

Mr. Davis: I think it is not proper to summarize everything he says in Mr. Bell's words.

Mr. Bell: Your Honor, it is the only way it can be clear to the jury.

The Court: I think that counsel has difficulty understanding the witness' words. The witness apparently is intelligent enough but is unable to speak

(Testimony of Bruno Agostino.)

the English language so that we can readily understand it. I think you can avoid a great many of the leading questions, Mr. Bell.

Q. (By Mr. Bell): Then, after they did start cutting timber what happened?

A. Well, when they cut the timber out, 'came into Anchorage [30] and I don't know what they did do. They cut my timber first because they couldn't go into that block until they go into my block of timber and they promise to come in and pay and I never see Mr. Morgan and I went and got Mr. Butcher to settle this thing and nothing has been settled so far, never got red penny yet.

Q. Then, as I understand, you came to Anchorage? A. Yes.

Q. And have you ever been paid anything up to this time? A. Up to right now.

Q. Mr. Agostino, did you and Mr. Butcher go back down to the place later?

A. Yes, we went down in there. We take an airplane and went in there and we take a picture and my timber was all cut off and they was using my pond and whatever they wanted to take out in the camp they had that in their possession—my sled—whatever they fitted them to use they taken because I give them possession.

Q. Mr. Agostino, I hand you a photograph that has been marked applicant's—rather, Plaintiffs' Exhibit Identification No. 3, and I will ask you to state, if you know, who took that picture?

(Testimony of Bruno Agostino.)

Mr. Davis: Your Honor, we are still examining and I will ask——

The Court: Will counsel wait until defendant has an opportunity to listen? [31]

Mr. Bell: If it is not objectionable, Your Honor, I will stand over here to save time.

Q. Mr. Agostino, who took that picture?

A. I take that picture, me and Mr. Butcher.

Q. Was Mr. Butcher there at the time you took it? A. Yes.

Q. Is that Harold Butcher, the attorney.

A. Yes.

Q. Now, would you tell the jury what that is a picture of?

A. That is a frame from Columbia Lumber Company set-up in my pond.

Q. And is that a good likeness of the condition that existed there that day? A. Yes.

Mr. Bell: I now offer it in evidence.

The Court: Is there objection?

Mr. Davis: I will have to examine them again, Your Honor. No objection.

Mr. Bell: May it be handed to the jury?

The Court: If there is no objection.

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph which has been marked Plaintiffs' Exhibit Identification 4, I will ask you to state who took that? A. I took that. [32]

Q. And was that taken at the same day that you took the other one that was just shown?

(Testimony of Bruno Agostino.)

A. Yes.

Q. And I have forgotten about what date you said that was?

A. I have forgotten the date myself. It was around the latter part of May, 1948.

Q. And that was the day that you and Mr. Butcher went there? A. Yes, sir.

Q. What is that a picture of?

A. This is the Columbia Lumber Company camp right on the back end of my pond. That is the pond here.

Q. Were those buildings there when you sold out to the Columbia Lumber Company?

A. No, they bring them on scows.

Q. Now, when did those scows come in? When did those buildings come into the mouth of Mosquito Creek?

A. They come in by March 23rd or 24th, 1948, and they stay there until first of April. I don't remember the date when they moved back because the pond is half a mile back of the water landing.

Q. And they were on the scows then when Mr. Lambert and you were talking on March 24, 1948?

A. Yes, sir.

Mr. Bell: We now offer the picture in evidence.

The Court: Is there objection? [33]

Mr. Davis: I have no objection to that one.

The Court: The photograph marked for identification as Plaintiffs' Exhibit 4 may be admitted.

Mr. Bell: May I now hand it to the jury?

The Court: It may be handed to the jury.

(Testimony of Bruno Agostino.)

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph which is marked Plaintiff's Exhibit Identification No. 5, and ask you to state who took it? A. Me and Mr. Butcher taken this.

Q. Was that taken at the same time the others were taken? A. Yes.

Q. Now, then, tell the jury what that is a picture of?

A. That is a picture right on west side to Columbia Lumber Camp. That is what I have. That is my tree-fall down.

Q. Was that in the ground you had bought from the Government for the timber—bought the timber from the Government? A. Yes.

The Court: It may be shown to counsel for the defendant.

Mr. Bell: Your Honor, he just looked at it.

Mr. Davis: Did you say, Mr. Agostino, that was the west side of the Columbia Lumber—?

The Witness: Yes, when they—west side of the camp, I say.

Mr. Davis: No objection. [34]

The Court: It may be admitted marked Plaintiffs' Exhibit No. 5.

Mr. Davis: May I now hand it to the jury?

The Court: It may be handed.

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph marked Plaintiffs' Exhibit Identification No. 6, and ask you to state who took that picture?

(Testimony of Bruno Agostino.)

A. I took that picture, me and Mr. Butcher.

Q. Was it taken at the same time the others were taken? A. Yes.

Q. Now, what is that a picture of?

A. That is the cut-off road from the pond through here, because when the tide is high we couldn't go around. It is a little bluff you seen in the map right at the edge of the pond.

Q. And that is on the ground where you built the road? A. Yes, two roads.

Mr. Bell: We now offer it in evidence.

Mr. Davis: No objection to Exhibit No. 6.

Q. (By Mr. Bell): Now, I now hand it to the jury please. Mr. Agostino, I hand you a photograph marked Plaintiffs' Exhibit Identification 7 and ask you to state who took that?

A. That is taken same time as the rest of them of it. That is the 'plane bringing me to Barry Arm that is in front of the [35] camp. That is the shore line.

Q. Where 'planes landed at your camp? Would they land there for coming to your camp?

A. That is the only place they can land, no other place to land. This is the donkey right there.

Q. In the left side of that picture does it show your donkey? A. Yes, sir.

Mr. Bell: I now offer it in evidence.

Mr. Davis: No objection.

The Court: It may be admitted.

(Testimony of Bruno Agostino.)

Q. (By Mr. Bell): Now, Mr. Agostino, I hand you a marked photograph, Plaintiffs' Exhibit Identification No. 8, and ask you to tell me if that picture was taken by you? A. Yes.

Q. Was that taken at the same time the others were taken?

A. It is a little donkey sitting there and the 'plane picture is below. That is the shore line.

Mr. Bell: Your Honor, I don't know whether the jury can understand. Please talk slowly, Mr. Agostino, and tell the jury what that is a picture of. Now talk slowly and make it clear.

A. That is a picture of the donkey, this lower donkey that we have there to work timber.

Q. Was that your donkey up to the 24th day of March, 1948?

A. It was my donkey until I give it to the Columbia Lumber [36] Company.

Mr. Bell: I now offer Identification No. 8, which is the donkey.

The Court: It may be admitted without objection and may be exhibited to the jury.

Q. (By Mr. Bell): Mr. Agostino, I hand you a photograph marked Plaintiffs' Exhibit No. 9 and ask you to state who took that picture, if you know?

A. I take that picture myself.

Q. Was it taken at the same time the others were taken? A. At the same time.

Q. Now, then, will you tell the jury what that is a picture of?

(Testimony of Bruno Agostino.)

A. That is a picture of the donkey sitting here with all these empties.

Q. Now, tell us again what it is in the picture; what it is a picture of?

A. That is the same donkey, 'way that is shown on the other picture and the empty barrels, all of them are empty barrels.

Q. Oil barrels, is that right?

A. Oil barrels.

Mr. Bell: I now offer Plaintiffs' Exhibit 9.

Mr. Davis: Your Honor, I think it is the third picture of the donkey. I think it is merely repetitious. [37]

Q. (By Mr. Bell): Mr. Agostino, I hand you photograph marked Plaintiffs' Exhibit No. 10 and ask you to state if you took that picture?

A. Yes.

Q. Was it taken at the same time you took the others? A. Yes.

Q. Now, then, tell the jury what that is a picture of? Now, talk slowly so they can understand you.

A. That is a picture of the pond where we keep log in.

Q. Now, is that a good picture of the place—that is a good likeness?

A. That is the way it look.

Mr. Bell: We now offer Plaintiffs' Exhibit Identification 10.

Mr. Davis: No objection.

(Testimony of Bruno Agostino.)

The Court: It may be admitted and exhibited to the jury.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit No. 11, which is a photograph, will you explain who took that picture?

A. Yes, I took that picture.

Q. Was it taken at the same time the others were taken? A. Yes.

Q. Now, then, tell the jury what that is a picture of?

A. That is a picture of back—that is a cut-off on the road that goes off to the pond. [38]

Q. It is a cut-off, you say?

A. Cut-off road here. It is another road around in there.

Q. That is a picture of the road?

A. Over the road.

Q. Where does the road lead to?

A. Into the pond.

Q. Now, where was your camp with reference to the end of that road?

A. On the west of this picture this way.

Q. West of the picture?

A. Yes, that is north and that is south and that is east and west. It is on this side.

Mr. Bell: We now offer Identification 11.

The Court: Is there objection?

Mr. Davis: No objection.

The Court: It may be admitted.

Q. (By Mr. Bell): I now hand you Plaintiffs'

(Testimony of Bruno Agostino.)

Exhibit No. 12, which is a photograph, please tell the jury who took that picture, if you know?

A. It was taken same time the others were taken. I take that picture.

Q. Was it taken at the same time the others were taken? A. Yes.

Q. Now, then, tell the jury what that is a picture of? A. That is a picture of the pond.

Q. The pond?

A. Pond what we store logs in.

Q. What you store the logs in? A. Yes.

Q. Is that a fair representation of the scene?

A. It is, that is the way it look.

Q. What is the little building?

A. That is the little building. That is where Lambert put up after he put in there.

Q. Blacky Lambert? A. Yes.

Mr. Bell: We now offer Identification No. 12 in evidence.

The Court: It may be admitted.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit No. 13, which is a photograph and ask you to state if you took that and under the same circumstances you took the others? A. Yes.

Q. Now, then, in your own words tell the jury what that is a picture of?

A. That is the edge of the logging-off land block. That is the new block you suppose to get in there.

Q. Did I understand you that this is the logged-off part? A. Logged-off part.

(Testimony of Bruno Agostino.)

Q. And that the back part is the new timber that you had [40] bought? A. Yes.

Mr. Bell: We now offer it in evidence.

The Court: Is there objection?

(No response.)

The Court: It may be admitted.

The Court: I think we might safely shorten the examination somewhat by asking the witness one question as to all of the photographs you intend to show to him, where he took them and under what circumstances and on what date and whether each of them is a fair representation of what it purports to show. Have counsel for defendant any objection to that?

Mr. Davis: Only, Your Honor, some of them were not taken at the same time. There are some pictures of a different size. I have no objection to that question as to all of these larger pictures. They were probably all taken at the same time. There are some smaller pictures.

Mr. Bell: I will do that, Your Honor. I think it is a very good suggestion.

Q. Mr. Agostino, I hand you for examination Plaintiffs' Exhibits 13, 14, 15, 16, 17, 18, 19, 20, 21—

The Court: Not the small ones.

Q. (By Mr. Bell): We will leave out 21, 22, 23, 24 and 25. You glance through those now and see if you took all of those pictures? [41]

A. Yes, I take all of this.

Q. Did you take them all?

(Testimony of Bruno Agostino.)

A. I take all these at the same time.

Q. On the same trip? A. Same trip.

Q. And on the same date? A. Same date.

Q. Are they fair likelinesses of the conditions that existed there at that time? A. Yes.

Q. Now, I will go through them. Now, tell the jury what No. 13 is?

Mr. Davis: I think you have already identified that.

The Court: It has already been introduced.

Q. (By Mr. Bell): Tell us what No. 14 is?

A. This is the first one you give to me. That is air frame sitting in the pond.

Q. Is that in your old pond? A. Yes.

Q. Did you build that there or not?

A. Well, the air frame of the Columbia Lumber Company bring it into my pond.

Q. Mr. Agostino, Ed wasn't here when you testified, what did you say that was? [42]

A. Air frame that they call it. A-frame, that pull a raft pulling the raft out of logs.

Q. I believe you stated that that was not there when you sold out but it was put in there by the Columbia Lumber Company? A. Yes, correct.

Mr. Davis: No objection.

The Court: It may be admitted and exhibited to the jury.

Q. (By Mr. Bell): Now, I hand you Identification 15 and ask you to state what that is a picture of?

A. That is a picture of what the sawmill set.

(Testimony of Bruno Agostino.)

That is the frame of the back end of the sawmill.

Q. Is that in the same condition that it was when you sold to the Columbia Lumber Company?

A. Yes, sir.

Q. And this was taken at the same time the others were taken?

(No response.)

Mr. Bell: We now offer this one in evidence.

Mr. Davis: No objection.

The Court: It may be received.

Q. (By Mr. Bell): I hand you Identification 16 and ask you to state what that is?

A. That is the pond. That is the Columbia camp on the back end of the pond. [43]

Q. Is that the pond that you used all during the time you were there? A. Yes.

Q. Now, what is the buildings that can be seen?

A. The original building in there, just give it to Columbia. They get it in there and set it up there. There was no building in there before, no building. The Columbia Lumber Company they bring it and set it up there.

Mr. Davis: No objection to that one.

The Court: It may be admitted and may be shown to the jury.

Q. (By Mr. Bell): I now hand you Identification 17 and ask you to tell the jury what that is a picture of?

A. That is a picture of one side of the pond with the road, I think, that goes in there.

(Testimony of Bruno Agostino.)

Q. With the road going into it? A. Yes.

Q. Now, is there anything in there that shows up in that picture that was not there prior to the time that you turned the section over to the Columbia Lumber Company?

A. Yes, that is the company building right there. You will see it as shown in the other picture is shown very little because we was too far for the camera.

Q. And that is the same buildings that were put in there that [44] you testified about in the other picture?

A. Yes, that the company put up there.

Mr. Davis: Your Honor, I object to this picture as being repetitious. That is about five pictures of the pond and about three of the building.

Mr. Bell: Your Honor, it shows that it is clear around. It is a large place.

The Court: Overruled. It may be admitted and may be shown to the jury.

I wish counsel would look at the pictures and not unnecessarily burden the record with repetition.

Mr. Bell: I don't believe there is any repetitions. We culled them yesterday.

Q. Will you please look at Exhibit No. 19 and tell the jury what that is a picture of?

A. That is alongside of the pond. The entrance over the pond.

Q. And does that open out into the sea from down to the river? A. Yes, and up.

(Testimony of Bruno Agostino.)

Q. Is there anything in that that is changed from the time you occupied?

A. No, nothing changed there.

Q. Just the same as it was when you had it?

A. Yes.

Mr. Bell: We offer it.

The Court: It may be admitted. [45]

Q. (By Mr. Bell): I hand you Identification No. 19 and ask you to tell the jury what that is a picture of?

A. That is the Columbia Lumber's machinery on the back end of the pond. They bring it in there.

Q. Was that there at the time you made the deal to sell it to them?

A. No, sir, they bring it afterwards.

Mr. Bell: We offer it in evidence.

The Court: Without objection it is admitted and may be marked as Exhibit No. 19.

Q. (By Mr. Bell): We now hand you Identification No. 20 and ask you to state what that is a picture of?

A. That is the Columbia Lumber Company camp.

Q. Is that a close-up view of the Columbia Lumber Company camp?

A. Set up on the back of the pond after I give them possession.

Q. Was that there at the time you gave them possession?

A. No, sir, they bring it afterwards.

Q. Was that sitting there when you were down

(Testimony of Bruno Agostino.)

there in June? A. Yes, sitting right there.

Mr. Davis: Do you mean May?

Q. (By Mr. Bell): Was that May or June? [46]

A. Latter part of May. We couldn't find out the day when I went there with Mr. Butcher.

Q. It was the day you and Mr. Butcher went there together?

The Court: It may be admitted.

Q. (By Mr. Bell): I hand you Identification No. 22 and ask you to tell them what that is a picture of?

A. That is the garage and the cat in there, you see them through the door and the donkey outside of the door and in front of the garage.

Q. Was that condition the same before you sold it to the Columbia Lumber Company?

A. Yes, sir, that is the way when I sold it.

Q. Was the caterpillar in the garage at the time you turned it over to them? A. Yes.

Mr. Davis: No objection.

Mr. Bell: We offer it in evidence.

The Court: It may be marked Plaintiffs' Exhibit No. 22 and shown to the jury.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit No. 23 and ask you to state what that is if you know?

A. Well, that is the same camp taken from another side—from another angle. [47]

Q. Does any of your old camp show?

A. No.

(Testimony of Bruno Agostino.)

Q. That is all the new camp?

A. That is the new.

The Court: It may be admitted.

Q. (By Mr. Bell): I show you Identification No. 24 and ask you to state to the jury what that is?

A. That is the way it was in the middle of the pond and this is the foreman that I sold—I sold representing Columbia—Mr. Blacky Lambert.

Q. Blacky Lambert, that is his picture in there?
(No response.)

Q. And he was the foreman for the Columbia Lumber Company? A. Yes.

Q. That is his picture on the right side?

A. In the middle of the pond.

Mr. Davis: Your Honor, to keep the record straight, I object to saying that Mr. Lambert was the foreman, was the foreman of the Columbia Lumber Company. He doesn't know whether he was or wasn't.

The Court: Overruled, motion will be denied at this time. The Jury is again instructed that unless it is shown that Lambert had authority to represent the Columbia Lumber Company the testimony cannot be considered. [48]

Q. (By Mr. Bell): I now hand you Plaintiff's Identification No. 25 and ask you to explain to the jury what that is a picture of?

A. That is of the garage, the same garage as is shown on the other picture, with a "D" on the other end—on the west end of the garage, you see.

(Testimony of Bruno Agostino.)

Q. Was that your D-8 caterpillar up to the time you sold to Columbia Lumber Company?

A. Yes, and there is the donkey in front of the yard.

Q. Is that in the same condition that it was prior to the time you sold it to him? A. Yes.

Q. Is the caterpillar in the same place that it was? A. Same place.

Mr. Davis: No objection.

The Court: It may be admitted and marked Plaintiff's No. 25 and exhibited to the jury.

Q. (By Mr. Bell): I hand you a photograph which has been marked Identification No. 26, I will ask you to examine it and state to the jury what it represents and what it is a picture of? That was the front end of the caterpillar? A. Yes.

Q. What building is that sitting in; do you know what the building is? [49]

A. It is sitting up to the Columbia Camp.

Q. Up at the Columbia Camp? A. Yes.

Q. Who took that picture?

A. I took that picture.

Q. Did you take it the same day you took these others?

A. No, sir, I take that the first part of September.

Q. First part of September of what year?

A. 1948.

Q. Is that a fair likeness of the cat and building as of that date?

(Testimony of Bruno Agostino.)

A. Yes. After they move it up to Columbia that is the way it looked like the way they had it.

Mr. Bell: I now offer in evidence Identification No. 26.

The Court: It may be admitted.

Q. (By Mr. Bell): I now hand you Plaintiffs' Exhibit Identification No. 27 and ask you to examine it and state who took the picture?

A. I took the picture.

Q. And about what date did you take that?

A. That is the same time I take the other.

Q. The last one you referred to? A. Yes.

Q. And that was about when?

A. Around the first of September, 1948. [50]

Q. Now, then, Mr. Agostino, tell the jury what that is a picture of?

A. This is the picture of the cat, D-8, with the arch. The company was working on my cat up to their camp.

Q. What is an "arch"?

A. An arch is something that they lift a big weight and drag it.

Q. Did you have an arch on that cat at the time you sold it to him? A. No, sir.

Q. Who had put that arch on there?

A. The company.

Q. And were the company operating that caterpillar in September, 1948? A. Yes.

Q. At the day that picture was taken?

A. Yes.

(Testimony of Bruno Agostino.)

Mr. Bell: I now offer the picture in evidence.

The Court: It may be admitted and marked Plaintiffs' Exhibit 27.

Q. (By Mr. Bell): I now hand you Identification No. 28 and ask you to state who took that picture? When did you take it?

A. That is the same time that I take the other.

Q. Well, the last group of pictures, you mean?

A. Yes.

Q. Where was that taken?

A. That is up to the Columbia Camp.

Q. Now, what do you see in that picture that you recognize?

A. On this picture here—I take this picture on the Columbia cat and I want to compare it with my cat, D-7, for they are the same size, that is Columbia cat that I had.

Q. You took that picture and this is the Columbia Lumber Company's own cat?

A. Yes, and I wanted to compare it with my D-7 to see if it was the same size.

The Court: It may be admitted and marked.

Q. (By Mr. Bell): I hand you Plaintiffs' Exhibit No. 29 and ask you to state who took that picture? A. I take that picture.

Q. And did you take that in September, 1948?

A. Yes, September, 1948.

Q. What does that picture show?

A. That is my D-7. That is why I take the other picture and compare with this one.

(Testimony of Bruno Agostino.)

Q. You took that at the Columbia Lumber Company camp? A. Yes.

Q. Was that your cat formerly? A. Yes.

Q. Was that in the possession of the Columbia Lumber Company in September, 1948?

A. Yes.

Mr. Bell: We offer it in evidence.

The Court: It may be admitted and may be marked Plaintiffs' Exhibit No. 29 and shown to the jury.

Q. (By Mr. Bell): I hand you Plaintiffs' Exhibit No. 30 and ask you to state who took that picture? A. I took that picture.

Q. And did you take that in September, 1948?

A. Yes.

Q. And what is that a picture of?

A. That picture represented the sawmill.

Q. What else does it represent?

A. That is the foundation of the wheel and the carriage and everything. The truck is complete except for the machinery to run it.

Q. That was taken after you had sold out to the Columbia Lumber Company? A. Yes.

Q. This picture represents a fair condition of it as of that date? A. Yes.

Mr. Bell: I offer that. [53]

The Court: It may be admitted and may be shown to the jury.

Q. (By Mr. Bell): I now hand you Identifica-

(Testimony of Bruno Agostino.)

tion No. 31 and ask you to state if you took that picture? A. Yes.

Q. When did you take that?

A. At the same time. I take it in September of 1948.

Q. Will you tell the jury what you see in that picture that you recognize?

A. Well, I see this, that is chocker and cable and things and materials alongside of the garage.

Q. And whose material were they formerly?

A. Yes.

Q. Were they yours before that?

A. They were mine before I gave it to Columbia.

Q. And that was taken in September——

A. '48.

Q. And was that in possession of the Columbia Lumber Company at that time? A. Yes.

Mr. Bell: I now offer it in evidence.

The Court: It may be admitted.

Q. (By Mr. Bell): I now drop back to the picture identified No. 21 and ask you to state who took that picture? [54]

A. I took that picture at the same time. Here is shown that the door over the garage and the cat was seen in there and here the door to the garage is empty. We pull out everything out of there.

Q. That was your garage? A. Yes.

Q. Prior to March 1st, 1948? A. Yes.

Q. Now in March, 1948 I understood you to say that the cat was in that garage? A. Yes.

(Testimony of Bruno Agostino.)

Q. Now, then, in September when you took this picture, the cat was not there?

A. Cat and everything had been taken out of the garage.

Q. Did you see that particular cat in September, 1948?

A. Yes, show the picture. I take a picture up to their camp, one of the pictures.

Q. Then the caterpillar, as I understand, that was in here in March, 1948, is the cat that you took a picture of up at the Columbia Lumber Company's camp in September, 1948? A. Yes.

Mr. Bell: We offer it in evidence.

Mr. Davis: No objection.

The Court: It may be admitted and may be shown to the jury. [55]

Q. (By Mr. Bell): Mr. Agostino, did you go back to your building, your bunkhouse and cook shack, later after September, 1948?

A. No, sir.

Q. You haven't seen it since then? A. No.

Q. Now, on this trip that you were there September, 1948, was the building empty or occupied?

A. No, it was occupied by Mr. and Mrs. Hooper.

Q. Did you talk to Mr. and Mrs. Hooper?

A. Yes, sir.

Q. Did they state whether or not they were employees of the Columbia Lumber Company at that time?

(Testimony of Bruno Agostino.)

A. Yes, they was employed by Columbia Lumber Company.

Q. I will ask you if Mr. Hooper gave you a paper on that date? A. Yes, sir.

Q. I hand you a paper that has been marked Plaintiff's Identification 32 and ask you to state what that is if you know?

A. Well, I asked him how they authorized to go into that house and they says they are already—

Mr. Boochever: I must object. There is no showing that Hooper has any authority to represent Columbia Lumber and his statement in that connection is hearsay.

The Court: Objection is sustained.

Q. (By Mr. Bell): Who gave you that paper?

A. Mr. Hooper.

Q. Where did he give it to you?

A. In the camp on the Barry Arm.

Q. Was that your old former camp where you lived for years? A. Yes, sir.

Q. And what date did he give it to you?

A. Well, they say August 30, 1948, it must be about August 30th or the 1st of September. Like I said, I went there in the first part of September.

Q. It was either August 30th or September?

A. Yes.

Q. And is it back now in the same condition it was at the time he gave it to you with the exception of the Reporter's mark on it or the Clerk's marks?

A. Yes.

(Testimony of Bruno Agostino.)

Mr. Bell: I now offer it in evidence.

Mr. Boochever: Same objection, the fact that it is just an unsigned written statement just the same as an oral statement.

The Court: Objection must be sustained. The paper may be filed so as to make it a part of the record if counsel desires it.

Mr. Bell: That will be fine.

The Court: I think we may as well suspend at this time until 10 o'clock tomorrow morning. [57]

Ladies and Gentlemen, the trial will be continued until 10 o'clock tomorrow morning. Everytime the jury separates it is the duty of the Judge to tell them—to charge them—that they must not discuss the case among themselves or with others or not listen to any conversation about it or not to form or express an opinion until it is finally submitted to them. So, you will hear that everytime you separate for lunch and the night until the trial is over.

Some of you have been on juries before and know all about it. May I remind the new members of the jury, particularly, that they ought to be careful not to listen to any conversation about the case. Jurors are on oath bound to determine the case upon the evidence they hear in the court room and they should not listen to anything that may be observed or stated by anybody outside.

You may now be excused.

(Testimony of Bruno Agostino.)

Court stands adjourned until tomorrow morning at 10 o'clock.

(Whereupon, at 5 o'clock, p.m., Tuesday, May 31st, 1949, the trial was adjourned until 10 o'clock, a.m. Wednesday, June 1, 1949.) [58]

Wednesday, June 1, 1949

Whereupon, at 10 o'clock, a.m., the above-entitled matter came on for taking of further testimony pursuant to adjournment at 5 o'clock, p.m., Tuesday, May 31, 1949. [59]

The Court: The roll of the jury will be called.

The Clerk: They are all present, Your Honor.

The Court: The witness, Bruno Agostino, will resume the witness stand.

BRUNO AGOSTINO

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

Further Direct Examination

By Mr. Bell:

Q. Mr. Agostino, you referred to the pond in examining those pictures, will you tell the jury what the pond was?

A. The pond is a little lake where we store the logs in.

(Testimony of Bruno Agostino.)

Q. And is that pond surrounded by something during the time you are putting the logs in?

A. It is around by what is called a "boom."

Q. Boom? A. Yes.

Q. How is a boom made?

A. A boom made of logs. Tie one to each other together.

Q. And how are they tied together?

A. With a chain or cable.

Q. On this particular place how did you tie the logs together?

A. Well, that is another boom to put the logs in and tie them together, too. [61]

Q. Now, you do that after you get them all in the water? A. Yes.

Q. Now, how would the boom logs or the stringer around it, how did you fasten them together at your works there?

A. They have got a hole on each end to put the chain in it and that locks them.

Q. I mean the boom logs, you said you fastened them together with a chain or a cable, which method did you use there?

A. You mean the logs—the boom?

Q. The outside boom that you keep in the pond to hold the logs until you are ready to fasten them together?

A. They have got the piling in there and they are still between the piling.

(Testimony of Bruno Agostino.)

Q. Now, Mr. Agostino, how did you fasten the ends of the boom logs together at your place?

A. Well, the chain, Mr. Bell.

Q. With a chain? How long is that chain?

A. About five feet.

Q. And how is it fastened to the logs?

A. It go into one log—I don't know what they call it at the other end—they have the kind of key and that straightened up and put into another log and straightened up into the loop, into the ring.

Q. All of your boom logs were equipped with that kind of equipment? [62] A. Yes.

Q. Was that pond a natural pond or did you dig it? A. That is a natural pond.

Q. Did you do any work on the pond?

A. No, except for the piling to hold a lot of logs in.

Q. In other words, you drove the piling, you mean? A. Yes.

Q. Who drove those pilings?

A. Me and Mr. Socha.

Q. And how many pilings were driven there?

A. Well, I don't know if I give you right number, it is about thirty anyway.

Q. 30? A. Yes.

Q. What are those pilings?

A. Hemlock piling about fifteen feet long.

Q. Hemlock piling about fifteen feet long?

A. Yes.

(Testimony of Bruno Agostino.)

Q. Now, did you have to do any cat work or caterpillar work on this pond, too?

A. No, only we pull the log in with a cat on the low tide and then when the tide is come in we just put them into boom and take them out.

Q. Where was this pond or log pond, as you call it, where was that with reference to your regular camp? [63]

A. It is a thousand feet from the bunkhouse on the east side.

Q. Now, where did you have the conversation with Blacky Lambert and Ted Rowell on or about March 24th, where were you standing or sitting?

A. We were sitting in the little cabin there about 500 feet from the main camp. That is where I was living alone and they came in there and we had all the conversation in there.

Q. That was a little cabin about 50 yards or 50 feet?

A. Well, call it 50 yards anyway.

Q. From the main big cabin—big camp?

A. Yes, over a little knoll.

Q. About what time of the day did they come there?

A. Well, I think the first time was about five o'clock at night after noon, p.m.

Q. That was the first trip?

A. That was the first trip.

Q. Now, confine yourself to about the 24th of March, the last trip or the third trip they came, tell us about when that was?

(Testimony of Bruno Agostino.)

A. First trip they came in about 20 March and they come in in the morning and we had a conversation and no can have what they want and they went back and then they came back again and we had a lot of talk again so we agreed. We have the conversation and they went back in on the 24th of March.

Q. Now, on the 24th of March, please tell us what Mr. Lambert said and what you said as near as you can? [64]

Mr. Boochever: Your Honor, for the purpose of the record we wish to interpose an objection as to what Mr. Lambert said.

The Court: Objection will be overruled at this time to await these further developments.

On this 24th of March, was that the third trip?

The Witness: That was the last trip.

The Court: You may answer counsel's question then.

Q. (By Mr. Bell): Now, then, in that conversation you have been asked what Mr. Lambert said, what Mr. Rowell said, and what you said?

A. Yes, the conversation was complete on 24th of March and that is the last time they come in. When they come in the last time the conversation was completed. That is the time I turned the possession of the camp to them.

Q. The word "position" do you mean "possession" do you?

A. Yes, turn the property over.

(Testimony of Bruno Agostino.)

Q. Now, then, tell what Mr. Lambert said, what you said, and what Mr. Ted Rowell said while you were all three together there that morning of the 24th—the day of the 24th?

A. Well, that is, the conversation was through on the third time. They just come in and move into the camp. We don't have any conversation on the 24th of March. The conversation was before.

Q. Now the conversation, the one immediately prior to that, was about the 20th, was it? [65]

A. The 20th and the 22nd and then they went back and they came in with this scow and boat and machinery—the whole outfit that was already settled.

Q. Now, then, what was said in the conversation on the 20th? Now, we hold it to the 20th of March, what was said in that conversation by you persons?

A. In the conversation was going to call Mr. Morgan and tell they can't land there until they buy me out and my price was \$25,000—\$19,000 for the machinery and \$5,000 for the rest of the stuff—\$6,000.

Q. Now, then, what did Lambert say when you told him that?

Mr. Boochever: I don't like to—I wonder if counsel would agree that anything Lambert states, any questions of that nature, will be regarded as objected to, subject, of course, to Your Honor's ruling.

Mr. Bell: I will agree that the conversation of

(Testimony of Bruno Agostino.)

Mr. Lambert may be considered objected to up to the time that we put Mr. Lambert on the stand, of course, and then if we qualify him, why——

Mr. Boochever: I just mean in regard to this witness' testimony.

The Court: It is understood and the record will show that all testimony of conversations between this witness and Lambert and Rowell are objected to by the counsel for the defendant.

Mr. Bell: That is all right. [66]

The Court: The objection will be considered overruled and all the testimony will go in under the objection of the defendant.

Mr. Bell: Please read the question.

(Question read.)

The Witness: Well, he went to call Mr. Morgan and came back to me and say Mr. Morgan will come up on the 12th of April and settle with me. So Mr. Morgan did come on the 10th of April.

The Court: What day of April?

The Witness: On the 10th he come up and give orders to start the machinery. So Mr. Lambert he started the machinery, but Mr. Morgan never come back.

Q. (By Mr. Bell): No, now hold yourself to the 20th. I just want to get what was said in each one of the conversations. Now, he said—tell what Lambert said on the 20th and then what you said on the 20th and what Rowell said or anybody else said that was in the conversation?

(Testimony of Bruno Agostino.)

A. Well, when I give the price on my property there they accepted it provided Mr. Morgan accept and they come back and tell me that it is okeh.

Q. Now, he did that on the 20th, all on the 20th, did he? A. Yes.

Q. Now, then, what happened on the 22nd, did you have—— [67]

A. They don't come in; they have to come into Whittier and back to me.

Q. What did they say in the conversation on the 22nd of March?

A. That is when they come back on the 23rd then to move his machinery. 'told me—they come to me and they say everything is all right. The way the conversation was set, and now we go to Hobo Bay and get the company outfit. And I say "Okeh, you have got the full possession."

Q. After they left then on that day, how long was it before they come back with the outfit?

A. About the—about five or six hours, I don't remember exactly, maybe seven hours. They are not very far.

Q. About how far was this bay from your place?

A. I would say ten or twelve miles, not over.

Q. Was that the nearest bay to your place?

A. That is the nearest safest bay to protected by the storms.

Q. And there was no other place, as I understood you to say yesterday, where the company

(Testimony of Bruno Agostino.)

could land and get timber above you without going up Mosquito Creek?

Mr. Davis: Your Honor, I object to that question. In the first place, if he answered the question——

Mr. Bell: I will withdraw the question.

Q. Was there anything said—no, I withdraw it. Was there any other landing where anybody could land their equipment and take out the timber on upper Mosquito Creek other than the [68] place you had your lands? A. No.

Q. Was Mosquito Creek large enough for two logging companies to operate on? A. No.

Q. When your booms were in position could anyone come and go to your camp? A. No, sir.

Q. They completely closed the waters?

A. Yes, sir.

Q. Now, then, when Mr. Morgan came back that was the 10th of April, was it? A. Yes.

Q. Did he come by 'plane or boat?

A. Well, they come there with the boat from Whittier.

Q. And where did the boats stop at that time??

A. Stopped there in the front of my camp.

Q. And that was the 10th of April?

A. Yes.

Q. Now, then, what was said by you and what was said by Mr. Morgan and what was said by Ted Rowell and what was said by Mr. Lambert, if

(Testimony of Bruno Agostino.)

anything? Tell what each one said on that occasion?

A. Well, Mr. Rowell and Mr. Lambert they talk with Mr. Morgan and I don't understand what is the conversation was but I hear they told him to start the machinery and he would be back in [69] two days and he never came back.

Q. Well, did they start the machinery?

A. Yes.

Q. Did it all run? A. Yes.

Q. Then, how long did you wait there for Mr. Morgan to come back? A. A month.

Q. Were they using your machinery and equipment during that time?

A. No, they never used the machinery, Mr. Lambert, no.

Q. He just started it up to try it out?

A. Yes.

Q. Now, then, did they land their houses and things there then? A. I don't understand?

Q. Did they land their scows there then?

A. Yes.

Q. What did they do during that month?

A. Well, they fixed the machinery, that was all the work, waiting for the snow to go out.

Q. Fixed the machinery and waited for the snow to go out? A. Yes.

Q. When did they actually start cutting logs?

A. Well, now, I couldn't tell you that day because after they [70] got the machinery fixed they

(Testimony of Bruno Agostino.)

move in back of the pond and I came in to Anchorage. I don't know when they started to cut the timber.

Q. Did they start using your bunkhouse and cookhouse?

A. No, they never use my cookhouse and bunkhouse.

Q. Not at that time?

A. Not at that time.

Q. When did they start using it?

A. Well, they started using it as soon as Mr. Lambert came out of the camp. They had a new foreman in there and they take everything over and move it out.

Q. Do you know how long Mr. Lambert was in there when he came out?

A. No, I couldn't very well tell the time he was there.

Q. Now, the time that you went back there with Mr. Butcher, was Lambert there then?

A. Yes.

Q. Now, what was he doing at the time?

A. Well, he directing the camp, the logging for the Columbia Lumber Company.

Q. He was director of the camp? A. Yes.

Q. Did you talk to him on that date?

A. Yes.

Q. And were they logging then?

A. Yes, they already was logging. [71]

Q. Did you see any of your cats in operation that day? A. Not that time.

(Testimony of Bruno Agostino.)

Q. Where were they?

A. They was in the garage.

The Court: What time is that?

The Witness: That was the first part of June, 1948, Your Honor.

Q. (By Mr. Bell): First part of June, 1948?

A. Yes.

Q. Now, when did you next go back, Bruno?

A. I went to there the last time was 29th or 30th, I have forgot.

Q. 29th and 30th of August?

A. Of August. I remember I left the camp on the 2nd of September.

Q. And you stayed there until the 2nd of September? A. Yes.

Q. Where did you stay during the time you were there? .

A. A little cabin back of the camp. Like I stated, it is prospecting cabin, a small cabin 10 by 12.

Q. A little 10 by 12 cabin, a little prospect cabin back of the camp? A. Yes.

Q. Who built that cabin? [72]

A. I—Mr. Stanley.

Q. You didn't interfere with the camp at all at that time? A. No.

Q. Were they operating the machinery and equipment then? A. Not yet, Mr. Bailey.

Q. Did you ever see them operating any of the machinery?

(Testimony of Bruno Agostino.)

A. The machinery started to operating on about the 11th of July, 1948, when Mr. L. Prout of Grant, that is the time they started moving the machinery and taking possession, using the oil, using the gas and using the bunkhouse.

Q. How much oil and gas did you have there at the time?

A. Well, one barrel of gas full and there was one-half and six barrel of diesel oil.

Q. That was for your caterpillars?

Mr. Davis: How much gas?

Mr. Bell: One and one-half barrel.

The Court: Better let the witness answer.

The Witness: One and one-half barrel gas and six barrel of diesel oil.

Q. (By Mr. Bell): When you were there the last time and took the pictures, I believe you stated that was in with Butcher in June? A. Yes.

Q. Now where were your caterpillars then?

A. In the garage. [73]

Q. In your garage?

A. In my garage, the company garage. I turn over everything to the company.

Q. But what camp were they in—your old camp or their new camp? A. In the old camp.

Q. Were they there then and operating at that place?

A. Yes, they operated back of the pond but they never move them to the camp back out yet until July 11, 1948.

(Testimony of Bruno Agostino.)

Q. And it was July 11th, 1948, before they moved up to their camp? A. Yes.

Q. When you were there did you see your cats in operation? A. Yes.

Q. And all of the equipment was being operated at that time?

Mr. Boochever: Object to that question as leading.

The Court: Objection is sustained.

Q. (By Mr. Bell): What did you see the last time you were there, if time means anything why I will just go on, Your Honor.

A. I went there to look at the camp and see if they had used the machinery or not and I take my camera and taken a picture that the machinery was working up to their camp.

Q. That is the small pictures that you identified yesterday? A. Yes. [74]

Q. Now, about what date was that?

A. What?

Q. What date was that, now?

A. That is about the 30th of August, 1948.

Mr. Bell: Your Honor, we will turn the witness.

The Court: Counsel for defendant may examine.

Cross-Examination

By Mr. Boochever:

Q. Mr. Agostino, I wonder if we could move the lamp and the microphone so that I may see you

(Testimony of Bruno Agostino.)

better. Mr. Agostino, you say that you and Stanley Socha went in there and owned the Barry Arm Camp, is that right? A. Yes.

Q. How about Ray Grasser, didn't he have some interest?

Mr. Bell: I object to that as improper cross-examination.

The Court: Overruled.

Mr. Bell: Exception.

The Witness: Mr. Grasser allowed his right to me and Stanley Socha. We are the two owners of the camp.

Q. (By Mr. Boochever): Didn't Ray Grasser claim to own most of the camp himself?

A. No, sir, we owe him \$3300 so he can't claim.

Q. You owe him \$3300 on it? A. Yes.

Q. Wasn't he a partner with you in it? [75]

A. He was a partner but withdraw. We make a settlement. He got no interest whatever.

Q. Did you make a written dissolution of the contract? Did you bind it up in writing or what?

A. No, we settled by oral contract.

Q. And did Mr. Grasser agree to the settlement?

A. Why sure, we pay \$1700. We have got the check to show that he accept so we did too.

Q. How much did he invest in the property?

A. Why, I don't know what he invested. He invested hardly more than Mr. Stanley did.

Q. How about the cat that was there? I believe it was the D-7?

(Testimony of Bruno Agostino.)

A. That is what invested the money, supposed to have cost him \$5,000 and the donkey \$4,000.

Q. And that was Mr. Grasser's, is that right?

A. What?

Q. That was Mr. Grasser's, is that right?

A. That was Mr. Grasser but we bought it from him, that is our property.

Q. Did he agree to that?

A. Of course he agree to that.

Q. How come you are sueing him?

A. I sue him because he come there without authority and started to take the machinery. [76]

Q. In fact, Mr. Agostino, he has taken that machinery away now, hasn't he?

A. I don't know, I haven't been in there; after I left it to Mr. Morgan I haven't been in there. I don't know what happened.

Q. And then the other caterpillar you were buying that on a conditional sale contract from Elemar Packing?

Mr. Bell: I object to that for the reason, incompetent, irrelevant and immaterial and not within the issues, nothing pleaded about it, and for the further reason it is not proper cross-examination.

The Court: Overruled.

Mr. Bell: And also on the further grounds that it is requiring the witness to pass upon a legal question as to whether or not the purchase was a conditional sales contract, which is a law question for His Honor to pass upon.

(Testimony of Bruno Agostino.)

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. You want me to answer question?

Q. Yes.

A. The cat we considered it paid in 1945 according to the OPA law because we pay \$4,000 in cash and 55,000 board feet logs.

Q. Was that under—you had a written conditional sales contract, did you not? [77]

A. Yes, but——

Q. And under that conditional sales contract you still owed money on the cat, is that right?

A. Yes, but that condition——

Q. And you——

Mr. Ross: Let the witness answer.

Mr. Boochever: He answer the question.

Mr. Bell: No, you have interrupted.

The Court: Let him finish his answer if he has further to say.

Q. (By Mr. Boochever): Do you have anything further to say in answer to that question, Mr. Agostino?

A. I wanted to say that that conditional sale, we notified Mr. Brown to come and get the rest of the logs and he never came because we wrote him a letter at the same time that they all lost a thousand dollars under the OPA system, and since that he came in on June, 1947, when Mr. Bent and he wanted to take my cat and I told my cat is here and I say

(Testimony of Bruno Agostino.)

“You can’t touch my cat until you pay.” There was the bookkeeper and Mr. Bent. After he looked at the cat he took a ’plane to come back to Elemar and I called the bookkeeper and I said he tell Mr. Brown to send a thousand dollars back here or I will go to Anchorage and sue for the money.

Q. And you are sueing them—Elemar Packing Company—aren’t [78] you? A. Yes.

Q. Regarding the same?

A. Will you please let me finish my story? As soon as the ’plane went down to Elemar, Mr. Brown came right back and he say “Mr. Agostino, you don’t feel very good.”

Mr. Boochever: I object to this, Your Honor.

Mr. Bell: He asked for it, Your Honor, let—

The Court: The counsel is completely out of order. Counsel should address the Court and not each other.

Mr. Bell: I move for a mistrial on the remarks of the Court.

The Court: The motion is denied.

Mr. Bell: Exception.

The Court: The witness may complete his answer, and if counsel insists on going into this on cross-examination he must take what he gets from the witness.

Q. (By Mr. Boochever): Will you continue, Mr. Agostino?

A. Mr. Brown come right back to the camp and say “Mr. Agostino, you don’t feel so good” and I

(Testimony of Bruno Agostino.)

say "No, Mr. Brown, you don't feel any good either and you send men here to take my cat." And he say "You are going to sue me?" and I say "Yes, if you are going to make trouble like this I am going to sue." And he say "You can't sue me"—no, he say "He don't sue me; let's call everything square and shake hands. You keep what you got [79] and I keep what I got." And he says the loss is a loss for both of us. That is the settlement with Mr. Brown.

Q. But you are sueing Elemar Packing Company on that now, aren't you?

A. Yes, I sue him because he failed to send me the bill of sale. I demand a bill of sale. That is what I sue him for.

Q. Did you tell Mr. Morgan of Columbia Lumber or Mr. Lambert that Elemar Packing Company had never given you a bill of sale for that cat and that they had a conditional sales contract for it?

A. Well, at that time I make a bargain to make this talk of Mr. Lambert, this conversation, Mr. Brown never came. Because I make a contract.

Mr. Boochever: Excuse me, Your Honor; I think the witness should answer my questions instead of going off into long explanation.

Q. The question is, Did you ever tell Mr. Morgan that you had not gotten a bill of sale to the tractor and that the tractor was on a conditional sale from Elemar Packing Company, did you ever tell Mr. Morgan that?

(Testimony of Bruno Agostino.)

A. No, sir. Your Honor, I can't—

The Court: No, just answer the question. You have answered. Your answer is "no" is it? Is it "no" I mean? I am not trying to tell you what to say.

The Witness: No. [80]

Q. (By Mr. Boochever): Did you ever tell Mr. Lambert in March that Mr. Grasser still claimed the tractor and the donkey? A. Yes.

Q. You told him that? A. Yes.

Q. Now, you mentioned your timber rights there, Mr. Agostino, and you said that you had three different timber contracts which you had completely logged, is that right? A. What?

Q. Completely logged off by 1948?

A. No, sir, I have one block never touched in 1948.

Q. How many blocks did you have altogether, sir?

A. Four blocks, three was logged and one never touched.

Q. That is what I understood. And that block which was never touched is still there never touched?

A. Unless cut by Mr. Morgan.

Q. Pardon me?

A. They already cut off by Mr. Morgan's order.

Q. Now, in regard to your timber rights, you have a picture there showing them, is that right?

A. Yes.

Q. And didn't you talk with Mr. Rowell at the

(Testimony of Bruno Agostino.)

end of the 1947 logging season and tell him that you were not going to log any more, that you were through logging? [81]

A. Never tell such a thing, no.

Q. You don't remember saying that?

A. Never tell such a thing.

Q. And didn't you tell him that you couldn't get anyone to go down there and work with you and that you were going to have to give up logging?

A. That is a lie.

Q. You don't remember saying anything of that nature? A. No, sir.

Q. Now, in regard to these timber contracts, where are they now?

A. The Forest Ranger got all of the receipts.

Q. You have a copy of it, have you not?

A. Yes, but I don't bring it here.

Q. Why didn't you bring it to Court so that we could see just what rights you have?

A. I think I have got the last one. I think my attorney has got it.

Mr. Bell: We have got the last one and we will give it to you if you want to see it.

Mr. Boochever: I would like to see it, sir.

Mr. Bell: Please have it marked for identification.

Mr. Boochever: Do you want it marked right now.

Mr. Bell: It should be marked.

The Court: Marked for identification as Defendant's [82] Exhibit "A."

(Testimony of Bruno Agostino.)

Q. (By Mr. Boochever): I show you what purports to be an application for modification of agreement and I ask you is this the last application you made for a timber contract? A. Yes.

Q. Take a look at it first, Mr. Agostino?

A. That is it.

Q. That is the last one? A. Yes.

Mr. Boochever: At this time, Your Honor, I wish to introduce this into evidence.

The Court: Is there objection?

Mr. Bell: No objection.

The Court: It may be admitted and marked defendant's exhibit "A" and may be read to the jury.

Mr. Boochever:

A 10fs-521

June 23, 1945

S

Sales, Chugash (PWS)

Barry Arm Camp

6/23/45

Application for Modification of Agreement

We, the Barry Arm Camp, Territory of Alaska, purchaser of timber in the above designated case, Chugach National Forest, [83] request that the paragraph relating to expiration date in the agreement signed in quadruplicate by us on the 23rd day of June, 1945, be modified to read as follows:

"All timber shall be cut and removed on or before and none later than 12/31/48."

If this application is approved we do hereby agree

(Testimony of Bruno Agostino.)

to cut and remove said timber in strict accordance with all and singular the terms and provisions of the aforesaid contract except as herein modified.

Signed in quintuplicate this day of, 1948.

BARRY ARM CAMP,
By /s/ BRUNO AGOSTINO,
Partner.

Witnesses

/s/ E. H. O'BRYAN.

Approved at Cordova, Alaska, under the above-conditions this 10th day of July, 1948.

/s/ E. M. JACOBSON,
Division Supervisor.

Q. (By Mr. Boochever): Now, I note that this is the blank day of blank, 1948, when this application was turned in to the Forest Service, Mr. Agostino, actually what was the date, about when was that?

A. That is about the 10th of July, 1948.

Q. About the 10th of July, 1948, was when you made that application [84] for extension of time to cut that timber, is that right?

A. Yes, that is right, but there is——

Mr. Boochever: That is the only question I have.

Mr. Bell: I object to him cutting the witness off.

The Court: Witness may explain.

The Witness: That is for the timber already cut off. The last permit they don't send me the receipt

(Testimony of Bruno Agostino.)

but the check show I paid \$250 on October 31st and I don't—I sent the \$250 for another 250,000 feet and I got the return of the check, the cashier of the United States Treasurer, but they don't send the sales slip yet.

Q. (By Mr. Boochever): Now, Mr. Agostino, let's get into this year here of 1948, now what time did you stay at the camp all winter? A. Yes.

Q. And you were there in March of 1948?

A. Yes.

Q. Is that right? And then you say early in March Mr. Lambert came up, is that right?

A. Yes.

Q. And you told him to get away?

A. To get what?

Q. Did you tell him to get away from there, that he had no right to come in there?

A. I told him not to land there because he interfere with me. [85] That is correct.

Q. And you said it would interfere with you and for him not to land there? A. Yes.

Q. Did you have a gun with you at the time?

A. No, sir.

Q. Did you threaten to shoot him if he would land? A. No, sir.

Q. Did you threaten to shoot his men if they would land or go around there?

A. No, sir, wouldn't shoot nobody.

Q. Then he came back later, is that right?

A. Correct.

(Testimony of Bruno Agostino.)

Q. When he came back later did you tell him he could land at that time or not? A. No, sir.

Q. You told him he could not land?

A. He could not land in there I told him because he would interfere with me.

Q. At that time you had no logs in the pond, is that right? A. Yes, some logs in there.

Q. Just scattered, is that right?

A. That is right.

Q. There was no boom chain running around the complete pond, was there? [86] A. No.

Q. There was nothing going all the way around it and locking it in?

A. The boom was in there only it was broken by the storm.

Q. I think you said there were about 17 or 18 boom logs which were scattered around, is that right?

A. Yes, that was because it was broke.

Q. And that pond the tide comes up in and out of that pond, is that right? A. Correct.

Q. You didn't dig the pond, did you?

A. Correct, no.

Q. It was just a natural pond that is there?

A. Natural pond.

Q. Then you told him that he couldn't come in there and land, right? A. Yes.

Q. What did he do, did he go back again?

A. He told me that maybe the company buy me out if I wanted to let him come in and I told him

(Testimony of Bruno Agostino.)

if the company want to buy me out and pay my price I said you can come in. So he say "I am going to talk with Mr. Morgan" and then he come in back again.

Mr. Boochever: Your Honor, I am in a position here where I have to go into what Mr. Lambert said on cross-examination [87] or else I lose my opportunity to cross-examine the witness, and at the same time I want to have any statements of Mr. Lambert the same objection apply to that, otherwise I am prejudiced in my case, Your Honor, because I can't cross-examine on the point without going into it.

The Court: I don't see how counsel can cross-examine and at the same time make objection to his own questions. Counsel may pursue whatever course he thinks is appropriate, but it would seem inconsistent to ask the witness questions and at the same time take an exception to any statement the plaintiff may make on the subject. If counsel wants to attempt it that will be for another court to pass upon.

Mr. Boochever: Well, Your Honor, I wonder if I couldn't go ahead with cross-examining him without waiving the objection that anything that Mr. Lambert said does not bind Columbia Lumber Company? That would not be inconsistent at all. I want that clear though that it is with that in mind that I am cross-examining him.

(Testimony of Bruno Agostino.)

The Court: Well, counsel may attempt it. I still don't see it. Counsel may pursue his own method of cross-examination within the general rule.

Q. (By Mr. Boochever): Now, Mr. Lambert came back a second time you say, is that right?

A. Yes. [88]

Q. And at that time you told him that you would sell the thing for \$25,000? A. Yes.

Q. And for him to go back and see Mr. Morgan about it, is that the way it was? A. Yes.

Q. In that connection just what property did you own there or did you claim to own?

A. I owned the right to use that land and one permit.

Q. Now, you say you owned the right to use the land? A. Yes.

Q. Who gave you that right?

A. That is the Ranger, the Forest Division. I pay the right to use that land. I pay the Government to use that land. He give me the right to use that land.

Q. What he gave you actually was the right to cut the timber off the land, is that right?

A. Yes, and travel all over that land and hold that land.

Q. But not the right to keep anyone else from traversing on that land?

A. I have the channel marked for my own use. Why should another fellow come in there and block me out.

(Testimony of Bruno Agostino.)

Q. Do you have any deed to that land saying you have any right to it?

A. Yes, that receipt you—I gave you is a deed.

Q. That is not a deed; that is merely the right to cut the timber on the land. But you had nothing else to give you—no other instrument other than that—to give you a right to that land, is that right?

A. Well, it seems if you go around the corner you have to take a license. If you don't have a license you can't—if you run a car you have to go and get the license over at the city. Same way if you going to cut log timber you have to get permit from the Land Office of the United States and he gives you a piece of paper.

Q. And you have no other record of title of that land, is that right? A. No.

Q. No other authority than on that?

A. No, just what the government give me.

Q. Now, then, besides that what else did you have in regard to that land?

A. Nothing, the right to cut the timber and sell it. That is the right they usually give to the people.

Q. What other property did you have there, Mr. Agostino?

A. I have a bunkhouse, a cookhouse, machinery and so on.

Q. What machinery did you have?

A. I have D-8 caterpillar.

Q. Is that the one that Elemar is claiming? [90]

A. Yes, and D-7.

(Testimony of Bruno Agostino.)

Q. And is that the one that Grasser is claiming?

A. Yes.

Q. What else did you have?

A. And a diesel engine, about 95-horse power.

Q. Is that the donkey that Grasser is claiming?

A. Correct.

Q. Did you have anything else?

A. We have a lot of stuff—blocks, cable—if you want to take an inventory, I haven't got them here, I can't remember every little thing. We have \$15,000 worth of stuff laying there besides the machinery.

Q. Then on March 24th you say Mr. Lambert and Mr. Rowell came back, is that right?

A. Correct.

Q. And you say at that time you gave possession to them?

A. That time they told me they have a talk with Mr. Morgan eight minutes long distance and he told all what I said.

Mr. Boochever: I object to this answer as not responsive to the question.

The Court: Answer the questions, Mr. Agostino.

Mr. Boochever: Read the question.

(Question read.)

A. Yes.

Q. To whom did you give possession? [91]

A. To Mr. Lambert.

Q. To Mr. Lambert? A. Yes.

Q. What did you do? By that you mean you let

(Testimony of Bruno Agostino.)

him land by the pond, is that what you mean by giving possession?

A. The pond. I turned everything to him when I gave him possession. That mean I turn over everything.

Q. You stayed on there, however, didn't you?

A. No, not stay. I tell him I stay in the little cabin, that prospecting cabin 500 yards from the bunkhouse.

Q. Did he go in and take possession of the bunkhouse?

A. No, but he land in that land and he take possession of the camp and he cut my timber.

Q. "He took possession of the camp" by that you mean the camp over the other side of the pond where they put the Columbia Lumber buildings, is that right?

A. No, he take the possession out of the main camp. He go in my garage and get pipewrench and everything he want with the exception of taking the machinery out.

Q. They didn't take the machinery out?

A. No, but they use all the other stuff.

Q. Did they go into your buildings?

A. Yes.

Q. Did they stay in your buildings?

A. No, but they use the building for water house, keeping [92] the stuff in there out of the rain.

Q. Did you give them permission to do that?

A. Correct.

(Testimony of Bruno Agostino.)

Q. And did they take any of your cats and use them at that time?

A. No, not that time.

Q. Did they sleep in your buildings at that time?

A. No.

Q. What they did they walked across where your timber rights were, is that right?

A. They walk across. They go in the bunkhouse. They go in the machinery shop and get what they want and go back in there again, that was it.

Q. Before they would go in to borrow any of this machinery they would secure your permission, wouldn't they?

A. No, sir.

Q. Did you tell them they could borrow it?

A. I told them that is that belonged to Columbia Lumber Company when I give them possession. That is their property.

Q. And did they set up a camp on the other side of the pond, is that right?

A. That is later—one month later they set up a camp in there.

Q. They didn't set up a camp in March 24th?

A. No, just landed at my cabin. But they stay there until [93] they move.

Q. What did they stay on the scow—where did they live?

A. They have a house on the scow. They stay there. In and out on the land and on the scow.

Q. They didn't do any operating or working there at that time, though?

(Testimony of Bruno Agostino.)

A. You can't operate there, just fixed the machinery.

Q. They fixed their own machinery?

A. Correct.

Q. They didn't work on your machinery?

A. Correct.

Q. And they didn't take your machinery and do anything? A. Not at that time.

Q. Then, subsequently, you say, in the middle of April Mr. Morgan came, is that right?

A. On the 10th of April.

Q. Now, when Mr. Morgan came did he talk to you at all? A. Yes.

Q. Did you offer to sell him the property at that time? A. *He* already sold to him.

Q. Didn't you say at that time, "I will sell you the property for \$19,000"?

A. No such thing, \$25,000. He say, "You start the cat and I will come back in two days and we will make a settlement."

Q. Didn't he tell you at that time that the price that you [94] asked at \$19,000 was ridiculously high? A. Never did such a thing.

Q. Didn't he tell you that the most it would be worth would be half of that value and as far as he was concerned he didn't need any of that equipment?

(No response.)

Q. The question, Mr. Agostino, didn't he tell you that he didn't want any of your property at all

(Testimony of Bruno Agostino.)

and that the most it would be worth would be about \$9,000? A. He never tell me nothing.

Q. And didn't he tell you that there was no deal; that he would not buy that property?

A. He didn't tell me nothing.

Q. Don't you remember him telling you that in the presence of Mr. Rowell and Mr. Lambert there?

A. No, sir, Mr. Lambert was there and he told Mr. Lambert to start the machinery and he would come back in two days and settle with me.

Q. Who told you? A. Mr. Tom Morgan.

Q. Did he come back in two days?

A. Never see that gentleman any more.

Q. Did he ever tell you that he was buying your property?

A. That was already the conversation that he would buy my property, he would. [95]

Q. Did Mr. Morgan ever tell you that he was buying your property? A. Yes.

Q. When? A. At that time.

Q. April 10th? A. April 10th.

Q. A minute ago the only thing he said he was going to go away and come back in two days?

A. Yes, and settle with me in two days.

Q. But he never told you that he agreed to buy that property? A. He did.

Q. What did he say?

A. He said he come back in two days and settle with me. I don't know what it mean in English.

(Testimony of Bruno Agostino.)

Q. He never said, "I will buy your property" or anything like that, did he?

A. The price was already settled. He said he would settle with me. That is all I know about it.

Q. Then you stayed on there, didn't you after that, Mr. Agostino?

A. No, sir, I when I turn it over I stay at my place.

Q. You stayed at Barry Arm at one of the cabins, is that right?

A. Yes, in my little camp waiting for that gentleman and he never come, so I come into town. [96]

Q. So you came into town and it was late in May when you came into town, is that right?

A. Yes.

Q. And you came to see your lawyer, Mr. Butcher, is that right? A. Yes.

Q. And then with Mr. Butcher you got a plane and went back out there around the 1st of June, is that correct? A. Correct.

Q. And when you got out there the first of June Columbia Lumber Company had its camp set up about a half-mile away from yours, is that right?

A. Yes, but they still on my property on the edge of the pond. Yes, that is my property.

Q. That is where they were, but they weren't in your buildings, were they?

A. And they work my permit of the forest and that is where they set their camp in there.

Q. They set their camp up there at the edge of the pond, is that right? A. Yes.

(Testimony of Bruno Agostino.)

Q. As far as your pictures show and all, your cats were just where you left them, weren't they?

A. Yes.

Q. And your buildings were just the way you left them, weren't they? [97] A. Yes.

Q. No one was living in there, were they?

A. Yes. Not at that time, no.

Q. In fact all the men of Mr. Lambert's were over in the Columbia Lumber Company camp?

A. Yes.

Q. And that was at the end of June—first of June? A. Yes.

Q. Now, then, after that you went from there and came back to Anchorage, is that right?

A. Correct.

Q. And you talked with your attorney, Mr. Butcher?

A. We went together and came back together.

Q. And then you decided that you would get hold of Mr. Morgan and make a deal with him to sell the property? A. Right.

Q. And that was in the middle of June?

A. Yes.

Q. So Mr. Butcher called Mr. Morgan on the phone, didn't he? A. Yes.

Q. And told him if he would come up to Anchorage you would make a deal to sell your property, is that right? A. Right.

Q. And he came there at the end of June, didn't he?

(Testimony of Bruno Agostino.)

A. Listen—that is correct. Mr. Butcher called Mr. Morgan. [98] He sent a telegram but Mr. Morgan never come around.

Q. Then Mr. Morgan came up at the end of June didn't he?

A. Mr. Morgan come here, came up the last of June.

Mr. Bell: May I suggest to Mr. Agostino, don't answer so fast. Take your time so the reporter can get it for the record and so the jury can understand it.

The Court: Court will stand in recess until ten minutes past three.

(Short recess.)

By Mr. Boochever:

Q. Mr. Morgan came up at the end of June to Anchorage, didn't he?

A. Why he no come up. We never know when he come up. I don't know.

Q. But he did come up to Anchorage sometime at the end of June, did he not?

A. He come up sometime in June—no, after July he come up.

Q. In July? A. Yes, sometime in July.

Q. Then did he meet with you and with Mr. Butcher in Mr. Butcher's office? A. Yes.

Q. At that time didn't you enter into a contract with Mr. Morgan? A. Yes. [99]

Q. And didn't your attorney, Mr. Butcher, put that contract down in writing? A. Yes.

Q. And didn't you sign that contract?

(Testimony of Bruno Agostino.)

A. Yes.

Q. I show you an instrument which is entitled Sales Agreement.

Mr. Boochever: I would like to have this marked for identification.

The Court: It may be marked as Defendant's Exhibit B.

Q. (By Mr. Boochever): Now, I show you a document marked Sales Agreement, and I ask you whose signature this is marked "Seller" down here?

A. Yes, but I revoke this contract.

The Court: Wait, just answer the question, whose signature is it?

The Witness: Mine.

Q. (By Mr. Boochever): And did you acknowledge that before Mr. Butcher? Is that his signature, do you know? A. Yes.

Q. And you signed this agreement then, right?

A. Yes.

Mr. Bell: May I see the exhibit?

Mr. Boochever: Yes, sir. I wish to offer this in evidence.

Mr. Bell: We have no objection. [100]

The Court: It may be received as Defendant's Exhibit B and may be read to the jury.

Mr. Boochever: Sales Agreement

This agreement, entered into this . . . day of July, 1948, by and between Bruno Agostino of Anchorage, Alaska, the party of the first part, hereinafter referred to as the seller, and the Columbia Lumber Company, a corporation organized under the laws

(Testimony of Bruno Agostino.)

of the Territory of Alaska, with headquarters at Juneau, the party of the second part, hereinafter referred to as the purchaser,

Witnesseth: Whereas the seller has in the past performed certain logging operations at Barry Arm in the Prince William Sound area under Forest Service permit, and

Whereas the purchaser is now engaged in similar operations at the same place, and

Whereas upon the termination of the logging operations of the seller, he left certain buildings, materials, and equipment at the Barry Arm Camp, and

Whereas, these buildings, materials, and equipment are of value to the purchaser and said purchaser can make use of the same in its logging operations,

Wherefore, it has been mutually agreed that the seller will sell and the purchaser will purchase all those buildings and all of that equipment and all of those materials now located at Barry Arm in the Prince William Sound area and the purchaser [101] will purchase all of the above-mentioned buildings, materials, and equipment for the total sum of Ten Thousand Dollars (\$10,000), lawful money of the United States, to be paid by the said purchaser to the seller in accordance with the following terms and conditions:

That following the signing of this instrument and before the 10th day of July, 1948, the purchaser

(Testimony of **Bruno Agostino.**)

will deposit with the Clerk of the District Court for the Third Division at Anchorage, Alaska, by and through Harold J. Butcher, Attorney for the seller, the sum of Thirty-three Hundred Dollars (\$3300.00) which sum is to be held on deposit in escrow by said Clerk of said Court for the purpose of saving the purchaser harmless from any claim made against the seller's camp and equipment and materials the subject of this purchase, by Ray Grasser, who has filed suit seeking from the seller the amount above stated; and it is agreed that the said sum will remain on deposit and will be held in escrow with said Clerk until the litigation between the seller and the said Ray Grasser has been settled by the Court. In the event that the seller is successful and a decision is made in his favor that no monies are due and owing to the said Ray Grasser, then said sum will be turned over to the said seller and if the decision is in favor of Ray Grasser in the sum stated or in any part of said sum, then said sum will be paid over to Ray Grasser by the said Clerk of the Court, or that part required [102] to satisfy said judgment. In the event that there remains monies in the escrow account which are not ordered payable to Ray Grasser by the Court, then such sums shall be made payable upon settlement to the seller herein named.

It is further agreed that on or before the 15th day of July, 1948, the purchaser will pay into the account of the seller at the Bank of Alaska at Anchorage the sum of Seven Hundred Dollars

(Testimony of Bruno Agostino.)

(\$700.00), and then commencing on or before the 15th day of August, 1948, the sum of One Thousand Dollars (\$1,000.00) per month paid in the account as indicated above and the same sum on each subsequent month thereafter until six (6) payments of One Thousand Dollars (\$1,000.00) each have been made into the account of the Seller. It is specifically agreed that there shall be no payment of interest on any amount herein stated.

Immediately upon the signing of this instrument by the purchaser and notice of such signing conveyed to the seller or to his attorney, Harold J. Butcher, a bill of sale covering all of the buildings, materials and equipment located at Barry Arm will be placed in escrow at the Bank of Alaska to be delivered to the purchaser upon its making payment in full the purchase price herein set forth.

The seller agrees that upon the execution of this instrument, the said purchaser may take possession of said buildings, materials and equipment located at Barry Arm and make use of [103] the same in such manner as the said purchaser desires, and that for all practical purposes said buildings, materials and equipment will be treated as though full title had passed to the purchaser.

This contract and all its terms and conditions shall inure to and be obligatory upon the parties hereto, their heirs, executors, administrators, successors and assigns.

It is hereby specifically agreed that all the terms and conditions in connection with this contract have

(Testimony of Bruno Agostino.)

been set forth herein and that there are no other agreements, verbal or written, pertaining to this sale or the method of paying for the same on the part of purchaser.

In Witness whereof, the parties hereto have hereunto set their hands and seals this 29th day of July, 1948.

/s/ BRUNO AGOSTINO,
Seller.

COLUMBIA LUMBER
COMPANY,

By /s/ THOS. A. MORGAN,
/s/ Pres.
Title.

United States of America,
Territory of Alaska—ss:

Be it remembered that on this 29th day of July, 1948, before me, the undersigned Notary Public in and for Alaska, personally appeared Bruno Agostino, one of the parties named herein, known [104] to me and to me known to be the seller herein-named, and he acknowledged to me that he signed and executed the foregoing instrument freely and voluntarily for the uses and purposes therein-mentioned.

Witness my hand and official seal the day and year herein-above last written.

[Seal] /s/ HAROLD J. BUTCHER,
Notary Public in and for
Alaska.

My commission expires April 23, 1949.

(Testimony of Bruno Agostino.)

Mr. Boochever: Your Honor, at this time I wish to renew my objection with regard to any oral testimony with regard to any agreement for the sale of this property in that the written agreement is the best evidence and that any oral agreement is in violation of the parole testimony.

The Court: Objection is denied at this time.

Q. (By Mr. Boochever): Mr. Agostino, that contract is dated July 29th, that is in error is it? That is in error, it should be June 29th?

A. (No response.)

Q. It is dated July 29th. Actually, you signed it on June 29th, didn't you?

A. (No response.)

Q. Do you remember that? [105]

A. I don't remember; I guess so.

Q. It was your attorney who prepared that contract, wasn't it, Mr. Butcher? A. Yes.

Q. And you signed it in his presence, didn't you?

A. Yes.

Q. And then your attorney sent it to Mr. Morgan, didn't he? A. (No response.)

Q. He sent the contract to Mr. Morgan for Mr. Morgan's signature, didn't he? A. Yes.

Q. Do you know Mr. Morgan wrote to your attorney and said the contract is—

Mr. Bell: I object to the statement—what he said. You can ask him if he knows whether Mr. Morgan wrote to him or not, not by testifying himself in a question there. Because what he would

(Testimony of Bruno Agostino.)

have written to Mr. Butcher would not be binding on this party until it was conveyed to this party or made known to this party.

The Court: The question is if he knows. Overruled.

Q. (By Mr. Boochever): Do you know if Mr. Morgan wrote to Mr. Butcher telling him that the contract was all okeh except he wanted a list of the specific items which were sold?

A. No, he never did tell that.

Q. You didn't know that? [106]

A. No, sir.

Q. Didn't you then see Mr. Butcher and tell him that you would not agree to making a list of the items and that you would not agree to the selling of one of the cabins there?

A. No, sir, never tell that.

Q. You don't remember that?

A. I don't tell that. I remember I don't tell anything of that kind.

Q. Didn't Mr. Butcher tell you that if you didn't want to go through with it that he would have nothing more to do with the case?

A. I quit Mr. Butcher because Mr. Morgan no sign the contract.

Q. But didn't Mr. Butcher tell you, you should make a list there of the items to go? And you told him that you would not let the cabin go, that you didn't want to sell that? Isn't that right?

(Testimony of Bruno Agostino.)

A. No. Mr. Morgan no want a list because he knows everything that was over there.

Q. I will show you a letter and ask you if you have ever seen a copy?

Mr. Boochever: Do you want to mark this for identification?

The Court: It may be marked for identification as Defendant's Exhibit C.

Q. (By Mr. Boochever): I show you this [107] letter and ask if you ever saw that or discussed the contents of that letter with Mr. Butcher?

A. No, sir.

The Court: Is that a letter or a copy?

Mr. Boochever: That is the original letter, Your Honor.

The Witness: No, sir, I never saw that letter before.

Mr. Bell: May we see it, please?

Mr. Boochever: Your Honor, do you wish that this be left?

The Court: Counsel may keep it if he desires to or he may leave it with the Clerk if he desires to.

Q. (By Mr. Boochever): Now, after that written contract was entered into, that you signed the written contract anyway, you subsequently told Mr. Butcher, didn't you, that you did not want the cabin to be included? A. What? What?

Q. Did not want your cabin to be included?

A. Why that cabin, they never wanted it, they never demanded that cabin; it—

(Testimony of Bruno Agostino.)

The Court: Answer the question.

Q. (By Mr. Boochever): Answer the question.

A. Yes, I told him he could include it if they wanted to.

Q. Didn't you tell Mr. Butcher that you wouldn't put that cabin in? [108] A. No.

Q. And then didn't you refuse to give a list of the items that were to be conveyed?

A. Never asked me.

Q. Did you ever make a bill of sale of the items to be conveyed? A. (No response.)

Q. Do you know what a bill of sale is—a paper saying that you sold them to them?

A. Didn't make no bill of sale.

Q. Now, after that contract you went back to Barry Arm again, didn't you, in August?

A. Yes.

Q. And at that time for the first time your cats were not there and Columbia Lumber had taken over the cats, isn't that right?

A. What time?

Q. At the end of August when you were back there? A. End of March?

Q. End of August? A. Yes.

Q. And that was the first time that Columbia Lumber had your cats, right?

A. Right, but Columbia take it on July 10th or 11th.

Q. Around there and that was when they took it

(Testimony of Bruno Agostino.)

after this written agreement had been signed by you, right? [109] A. Yes.

Q. That was when they took it? A. Yes.

Q. And that was the first time that anyone from Columbia Lumber was living in your camp, right?

A. Yes.

Q. Who was living there?

A. Mr. Morgan himself was there until Mr. Hooper and Mrs. Hooper and a few other fellows, I no get his name.

Q. And you talked with Mr. Hooper while you were there? A. Yes.

Q. And then about the first of September Mr. Hooper told you that Columbia Lumber had given orders that your deal was off and it wasn't going through and for them to leave the property entirely, didn't he?

A. 30th of August was the last I seen him because I never went there any more.

Q. When you saw him didn't he tell you that he had no authority from Columbia Lumber to stay there any longer, that they had told everybody to leave the property then?

A. Never tell me nothing. He said Mr. Morgan give him authority to stay right there and I say "Okeh".

Q. Didn't he ask you for your permit to stay there? A. No, sir.

Q. And didn't you tell him "Yes, you can stay

(Testimony of Bruno Agostino.)

there; I would [110] like to have someone look after the property? A. No, sir.

Q. And at that time you were living in your little cabin, is that right?

A. I live in there two days and then I come to Anchorage.

Q. Did you have Columbia Lumber Company's permission to live in that cabin? A. No.

Q. Did you ask anyone's permission?

A. I went there because I got my pots and clothes in that little cabin and the Company no want the cabin so I stay there.

Q. How long did you stay there?

A. About two days waiting for the return of the plane.

Q. And your clothes were in the cabin all the time until then, is that right?

A. They still there because I was going——.

Q. They are still there?

A. If the Company no throw them out they are still there.

Q. In other words, you still have your clothing and equipment there?

A. I left them there; I don't know if they are there or not.

Q. Now, you said when you were up there in August—in the end of August—you saw your cats?

A. Yes.

Q. And you said they were working. You mean they were working [111] on the cats, don't you?

(Testimony of Bruno Agostino.)

A. What?

Q. When you said the cats were working, what you meant was that the Columbia Lumber men were repairing the cats?

A. No such a thing; they were working on the log. They got the arch on the D- to pull a log at a time and the D-7 to dragging a log, that is what I meant by working.

Q. Don't you know that they returned those cats and put them right back in your property the way they were they this deal fell through? A. No.

Q. So they were placed right there?

A. I don't know.

Mr. Boochever: I would like to look at the picture exhibits, please.

Q. I show you Plaintiffs' Exhibit No. 26 and ask you when that picture was taken, Mr. Agostino?

A. That picture was taken, I have forgot the date now. That is on the first picture.

Q. Was that taken when you were there with Mr. Butcher? A. Yes.

Q. That was taken with Mr. Butcher?

A. Yes.

Q. And then I show you this picture here and ask you when that was taken? [112]

A. That is taken with Mr. Butcher.

Q. Now, that is Plaintiffs' Exhibit No. 29. In other words that was taken around June 1st, is that right? A. Yes, or latter part of May.

Q. Didn't you in your examination yesterday

(Testimony of Bruno Agostino.)

say that that picture was taken on September 1st?

A. There is another bunch been taken on September, that is not that kind.

Q. I believe that yesterday you said that both of these pictures were taken on September 1st?

A. No.

Q. That is wrong? In other words, all the other pictures taken by Mr. Butcher were blown up but these were kept small, is that what you are trying to say? A. Yes.

Q. Then, actually, it was the first of August—the end of August that you first saw Columbia Lumber men using your camp property there other than the fact that they occupied the area by the pond, right? A. Yes.

Mr. Boochever: That is all, Your Honor.

The Court: Any redirect examination?

Redirect Examination

By Mr. Bell:

Q. Mr. Agostino, you testified in an answer to his question [113] about Mr. Butcher calling Mr. Morgan. Now, do you know about what time that was that Mr. Butcher called Mr Morgan?

A. No.

Q. Now, on cross-examination the question was asked you if you didn't have Mr. Butcher to call Mr. Morgan and ask him to come up here to sell him the property, now, did you do that?

(Testimony of Bruno Agostino.)

A. No, sir, not for sale, to settle the contract—to settle the price, but they never came.

Q. Now, up to that did you have any understanding with Mr. Morgan that the original sale was off?

A. No, sir. Mr. Butcher called me here to make a settlement on the sale but Mr. Morgan never came.

Q. Now, then, when you signed this contract that he has introduced in evidence, about what date did you sign it—the date that it shows on it?

A. Well, it was around the 1st of June. It must have been because Mr. Butcher on the 8th of June he went to the convention in Pennsylvania. That is only thing I can remember. I no keep track of things.

Q. Now, Mr. Agostino, will you look at Defendant's Exhibit B and state if it is dated in the same color of ink that you signed it?

A. Yes, they look alike. Here is the 29th day of July, but that is a mistaken.

Q. You think it was before that time? [114]

A. Yes, sir.

Q. Well, but the acknowledgement shows the same date, does it not? A. Yes, sir.

Q. 29th day of July?

A. I was not here in July.

Q. Now, did you ever have any knowledge that Thomas A. Morgan ever signed that contract?

A. He never signed. I revoked that contract because he never come near me.

(Testimony of Bruno Agostino.)

Q. When did you first learn that it was the contention of the defendant that Mr. Morgan had signed this contract?

A. Why, as far as I know he never signed it.

Q. Did you ever know before today that this contract was shown to you, that Thomas A. Morgan had ever signed it? A. No.

Q. Mr. Agostino, I hand you an exhibit that has been marked Plaintiffs' Exhibit Identification No. 33 and I will ask you to look at that and say what that is? Turn it over and examine the face of it and if you can tell what that is?

A. It has got the same date. That is the same contract, I suppose.

Q. Is that an exact copy of the one that counsel for the defendant has introduced in evidence here?

A. (No response.) [115]

Q. I will ask you to compare it with this contract and look at it carefully and see if it is a copy of this one. Check it kind of by paragraphs, Mr. Agostino, on the face. Is it an exact copy of this one?

A. Exact copy of this one. That is the original.

Q. Does it show that you signed the copy—your copy there? A. Yes, sir.

Q. Now, does that show that Mr. Morgan ever signed it?

A. Never signed it; never signed it yet.

Mr. Boochever: I notice one difference in here. This is marked the 5th day of July while the other one is marked the 29th day of July. The original

(Testimony of Bruno Agostino.)

portion is marked the 5th day of July, which is probably more correct on the date. I think the other one is in error.

Mr. Bell: Do we agree that otherwise they are exact copies?

Mr. Boochever: Yes.

Mr. Bell: May I offer in evidence the copy?

The Court: It may be admitted as Plaintiffs' Exhibit No. 33. It may be read to the jury.

Q. (By Mr. Bell): Mr. Agostino, is this the only copy of the contract that you were ever given at any time? A. That is all I got.

Q. Now, that is your signature on it? [116]

A. That is my signature right there.

Q. And it shows an acknowledgement as the 29th day of July, 1948, does it not—the acknowledgement here? A. Yes.

Q. Now, does this copy show that Mr. Morgan ever signed it? A. Never signed it.

Q. And this is the only thing you have ever had?

A. Only thing I have to show.

Q. Would you please tell the jury the circumstances leading up to your signing of those two articles that have just been introduced that you looked at?—

A. Your Honor, can I explain?

Q. —being the contract offered by the defendant and your copy of the same contract offered by you? Please tell the jury what took place prior to signing those?

(Testimony of Bruno Agostino.)

Mr. Boochever: Your Honor, I object to that, that the contract speaks for itself and it is a complete instrument and states that the Columbia—and states that it includes all agreements.

Mr. Bell: There is no pleading that this contract was ever signed.

Mr. Boochever: It doesn't have to be a pleading, Your Honor, the contract is in evidence and it is a written agreement and speaks for itself. [117]

The Court: Overruled. You may answer.

The Witness: This contract, when I sign it, Mr. Morgan step in just two minutes in Mr. Butcher's office and he make this compromise offer—\$10,000.00. Mr. Butcher draw the contract and give it to me to sign it. I asked him, I say, "When Mr. Morgan come here to sign it?" And he says we send it to Juneau. I sign the contract. I take his advise and sign the contract to send to Juneau and wait one month and never a contract come back, never been signed by Mr. Thomas Morgan. Well, finally, on the 10th of July I went to Whittier and I met Mr. Morgan and I say "How about that contract, are you going to sign it?" And he say "Yes" but never did. I met him again another time up in the Barry Arm, I say "How about that contract?" "Oh," he say "you come to town and I give you the money." I come to town and never see this gentleman and the contract not signed yet.

Q. And, as far as you know, the first time you

(Testimony of Bruno Agostino.)

ever knew that Morgan signed it is this morning when it was shown to you?

Mr. Davis: That question is manifestly leading the witness and I object.

The Court: Objection is sustained; counsel should avoid leading the witness.

Q. (By Mr. Bell): When was the first time that you ever knew that Mr. Morgan ever signed that contract? [118]

A. Well, that was late in September. I met him three time. I met Mr. Morgan and I told Mr. Butcher the contract is out. I will revoke. I will have nothing to do with it because he never pay me one cent and he never sign a contract. I have got nothing to show and I started the suit against him.

The Court: The witness didn't understand your question.

Q. (By Mr. Bell): Now, then, when was the first time—tell the jury the first time that you ever knew that Morgan signed that contract?

A. I know in June and July they don't sign the contract.

Q. Answer the question. When did you first see and know that Mr. Morgan signed the original contract, when did you see that and when did you know?

A. Just now he show it to me. I never see it before.

Q. Up to the time it was shown to you in Court this morning you never knew that Morgan signed it?

(Testimony of Bruno Agostino.)

A. That is right, never seen it before.

Q. Did he ever pay you anything?

A. Never give me a red penny.

Q. What date was it that you talked to Mr. Morgan and told him the deal was off and that you had sued him or did you see him after you had sued him, maybe I misunderstood you, did you see Mr. Morgan after you filed this suit?

A. No, I don't see Mr. Morgan until now in this session of Court. I just notified Mr. Butcher I quit him and I get Mr. [119] Bell and Ross and I started suit against Mr. Morgan for my money.

Q. What was the reason why that you and—what was the reason why you signed the \$10,000.00 contract, explain that?

A. Just to avoid the trouble between me and him and take so long a time I would take any offer at that time, but after he fooled me like that I wanted the full amount that we contracted to.

Mr. Bell: That is all.

Recross-Examination

By Mr. Boochever:

Q. Mr. Agostino, you say that Mr. Butcher went away to a convention, is that right? A. Yes.

Q. Now, he went away about July 8th, isn't that it? A. July 8th or June.

Q. Some one of those two months?

A. It was after you signed this written contract, was it?

A. Yes.

(Testimony of Bruno Agostino.)

Q. And he was away for several weeks, wasn't he? A. Yes.

Q. And that is probably why you didn't hear what Mr. Morgan had written him in regard to the contract?

Mr. Bell: I object to that as fairly calling for a conclusion. [120]

The Court: Objection is sustained.

Q. (By Mr. Boochever): But Mr. Butcher was away for several weeks there? A. Yes.

Q. Then when you talked to Mr. Butcher again—
A. Yes.

Q. Remember, now, didn't you tell Mr. Butcher that the small cabin was not to be included?

A. No, sir, never told him that.

Q. You still have your property in that cabin, don't you?

A. I have got nothing but personal property. I got nothing in there but my little blankets, that is all.

Q. And you told Mr. Butcher also at that time that you would not give a list of the equipment that you didn't want to go through with this contract, didn't you?

A. No, sir, Mr. Morgan he no want a list because he knows everything that is in there when we draw the contract. We offer him the list to take an inventory and he won't take it.

Q. I show you Plaintiffs' Exhibit for Identification No. C which purports to be a letter from Mr.

(Testimony of Bruno Agostino.)

Butcher to Mr. Morgan and ask you again if you hadn't discussed that letter with Mr. Butcher?

A. I just never see that letter until just now when you show it to me.

Q. Now, then, you say you quit Mr. Butcher. Isn't it true [121] that Mr. Butcher told you that he would not represent you any further in this because you would not go through with the contract?

A. No, sir, I tell you why he quit me, because he wanted my power of attorney to settle with Mr. Morgan and I refused to give it to him.

Q. You refused to go through with the contract?

A. I refused to give him power of attorney. I don't give nobody power of attorney any more.

Q. So he suggested you go see another attorney?

A. No, he don't have to tell me what I do.

Q. In fact, he recommended that you see Mr. Ross, didn't he?

A. No, sir. He had sent me to, as I say, see Mr. Roley but I tend to my business, I don't have him tell me what to do.

Mr. Boochever: That is all.

(Witness excused.)

Mr. Bell: We want to call Mr. Brunelle, the Clerk of the Court.

The Court: Mr. Brunelle is in Seward.

Mr. Bell: Who does keep the books in there?

The Court: I don't know. Will it be admitted that the money was never deposited with the Clerk's office?

Mr. Boochever: I, frankly, don't know whether that is so or not.

Mr. Davis: Your Honor, Mr. Morgan gave the checks to Mr. [122] McCarrey and he didn't know whether they were actually put in with the Clerk or not.

The Court: Very well.

Mr. Boochever: We will stipulate that it was never paid to the Clerk of the Court.

The Court: Ladies and Gentlemen of the Jury, you may consider this stipulation as conclusive evidence that this money was not placed in the hands of the Clerk as outlined in Defendant's Exhibit B, and counter-part of which is Plaintiffs' Exhibit No. 33.

It is now 12 o'clock and the trial will be continued until two and Ladies and Gentlemen it is my duty to remind you that you should not discuss the case among yourselves or with others or listen to any conversation about it, nor should you form or express an opinion until it is finally submitted to you.

(Whereupon, at 12 o'clock, Noon, the hearing was recessed until 2 o'clock, p.m. the same day.)

Afternoon Session

The Court: Roll of the jury may be called.

(Names of members of the jury were read and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Another witness may be called on behalf of the plaintiff.

Mr. Bell: Mr. Lambert, please.

KENNETH D. LAMBERT

called as a witness, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bell:

Q. State your name, please?

A. Kenneth D. Lambert.

Q. What is your middle initial? A. D.

Q. And are you also known as Blacky Lambert as a nickname? A. Yes.

Q. During the fall of 1947 did you make a timber cruise for the Columbia Lumber Company?

A. Yes.

Q. Who went with you on that trip?

A. Mr. Rowell.

Q. When you returned from the trip did you make a report to the Columbia Lumber Company?

A. Yes.

Q. By whom were you employed to make the trip? A. Mr. George Morgan.

Q. That is George Morgan of the Columbia Lumber Company? A. Yes.

Q. Where, Mr. Lambert, did you go in making that cruise?

(Testimony of Kenneth D. Lambert.)

A. Well, we went to several different places—one to Barry Arm.

Q. Did you make a trip up the Barry Arm area?

A. Yes.

Q. Did you find Mosquito Creek?

A. Approximately three or three and one-half miles.

Q. Up Mosquito Creek? A. Yes.

Q. After you returned did you make a report to Mr. Morgan, you say? A. Yes.

Q. I hand you a paper that has been marked by the Clerk as Plaintiffs' Identification 34 and ask you to state what that is?

A. This is a report that we made on the Barry Arm cruise for timber surveying.

Q. Do you know who typed that?

A. Well, Mr. Morgan, I think, had this typed. We was present at the time. The girl in the Columbia Lumber Company office [125] typed it up.

Q. Where was their office at that time?

A. At Whittier.

Q. And you were given a copy of that report?

A. Yes.

Q. Is that the copy that was given to you?

A. Yes.

Q. Is that in the same condition that it was at the time it was finished? A. Yes.

Q. Outside of the Clerk's stamp on the back?

A. Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Bell: Your Honor, I will not offer it now but will give them a chance to carefully examine it.

Q. Mr. Lambert, on the trip, where did you leave to go on the trip? A. From Whittier.

Q. And how did you go from Whittier to Barry Arm? A. By boat.

Q. And where did you leave the boat?

A. The boat was parked in front of Mr. Agostino's house in the Bay.

Q. How did you go on up through that country?

A. Afoot.

Q. And you went up about three and one-half miles, you say? [126] A. About that, yes.

Q. And did you make a general survey of the timber that could be reached for logging in that area? A. Yes.

Q. Now, that was in the fall, I believe you said, of '47? A. Yes.

Q. Now, when did you next see Barry Arm camp? A. Not until the spring of '48.

Q. Now, at that time in the spring of '48 who were you working for?

A. Columbia Lumber Company.

Q. And in what capacity?

A. Well, in the capacity as a foreman more or less.

Q. Just tell what happened the first day in 1948 that you saw Barry Arm Camp, what you did there?

A. We went up to see if there was any ice in the river to see if we could take the equipment in.

(Testimony of Kenneth D. Lambert.)

Q. Who did you see there?

A. Mr. Agostino.

Q. Did you ever have a conversation with him?

A. Yes.

Q. Will you please tell about what was said by you and what was said by him at that time?

A. Well, Mr. Agostino informed us that we couldn't move the [127] equipment in; that he had a timber sale in there and prior rights to it.

Q. And how long did you talk to him on that occasion? A. Oh, possibly an hour.

Q. And was there anything said in that first conversation about buying Agostino out? A. No.

Q. Now, then, after you went back—left there, where did you go? A. To Whittier.

Q. Who did you report to at Whittier?

A. Mr. Ted Rowell.

Q. In what capacity was Ted Rowell acting?

A. He was a mill superintendent.

Q. For what company?

A. Columbia Lumber Company.

Q. The defendant in this action? A. Yes.

Q. Now, did you tell Ted Rowell what took place between you and Agostino? A. Yes.

Q. What was done then so far as you or Ted Rowell or Mr. Morgan was concerned or officers of the Columbia Lumber Company at that time?

A. Why, we called Mr. Morgan in Juneau, I think was where [128] he was and explained the

(Testimony of Kenneth D. Lambert.)

situation to him and he said that Bruno—Mr. Agostino, rather—had no rights to the timber whatsoever, that they had bought all of the timber rights and that we were to go ahead and move in.

Q. And then did you go back again?

A. Yes.

Q. And did you talk to anyone at that time?

A. We talked to Mr. Agostino.

Q. And where were you when you talked to him the second time? A. At Barry Arm.

Q. Was that near the camp? A. Yes.

Q. What time of day was it?

A. Well, I couldn't say offhand what time of day it was.

Q. About how long after your first trip in was it?

A. Oh, possibly a week.

Q. And about what date would that be?

A. Well, that would be sometime around the 20th of March, approximately there, maybe the 15th, I don't remember exactly.

Q. Now, then, tell us what the conversation was between—wait, I will withdraw that—Who was with you when you went in that time?

A. Mr. Rowell.

Q. That was the foreman or superintendent of the mill for the Columbia Lumber Company? [129]

A. Yes.

Q. What was said in the conversation by Mr. Agostino, yourself and Ted Rowell?

(Testimony of Kenneth D. Lambert.)

A. Well, there was a conversation about moving the equipment in and we explained the situation to him that they had purchased it and Mr. Agostino said they couldn't move in until some provision was made for them buying him out, and that is about the extent of that.

Q. Did Mr. Agostino show you any papers or anything at that time showing that he did have a timber purchase there?

A. Yes, he showed us a telegram he had received from the Forest Service.

Q. Do you remember whether or not he gave you that telegram to take back with you? A. Yes.

Q. And who did you give that telegram to?

A. Mr. Rowell has that telegram in his possession at that time.

Q. Can you remember the contents of that telegram?

A. Well, not word for word, it was a telegram from the Juneau office stating that he had a continuation of his timber sale of 250,000.

Q. Then what did you do with the boats at the time you and Ted were together there, where did you go after this conversation? [130]

A. We went back to Whittier.

Q. Then did you communicate with Mr. Morgan?

A. Yes.

Q. And was there in this conversation anything said about the price or a sale?

A. I think there was, yes.

(Testimony of Kenneth D. Lambert.)

Q. Can you remember what Agostino said about that?

A. Well, he said that he wanted \$19,000 for his equipment plus \$6,000 for his buildings.

Q. And did you give that information to Mr. Morgan? A. Yes.

Q. How did you give it to him?

A. I think it was by a wire.

Q. And did you have any telephone conversation with him? A. Oh, yes.

Q. Now, who participated in that telephone conversation?

A. Well, I talked to him and Mr. Rowell talked to him.

Q. You were well acquainted with Mr. Morgan, were you? A. Yes.

Q. Did you know his voice on the 'phone?

A. Oh, yes.

Q. Now, then, please tell the jury what took place in the 'phone conversation?

A. Well, we told Mr. Morgan of the condition—that there was a camp, that Mr. Agostino didn't want us in there and I think we mentioned the price over the 'phone to Mr. Morgan at the [131] time. Mr. Morgan said if he wouldn't let us move in and there was indications of any trouble like that to have him put off, to get the Marshal and have him put off if it was necessary. We didn't want to do that. So, I think—whether it was at that time or whether it was a later date Mr. Mor-

(Testimony of Kenneth D. Lambert.)

gan sent a telegram stating that he would be up and make some kind of arrangements with Bruno—or Mr. Agostino, I should say—and I think that was supposed to have been sometime around the 10th of April.

Q. Now, then, when you went back in the next time, say, the third trip you made in, did Ted Rowell go with you that time?

A. I don't remember whether he was with me or not. I think he was at that time.

Q. Did you have a conversation with Bruno Agostino at that time? A. Yes.

Q. Would you please tell the jury about the date of that as near as you can?

A. Well, it was sometime around the—oh, maybe—possibly around the 25th of March. We told Mr. Agostino then or we showed him the telegram that Mr. Morgan would be up and make some kind of a settlement with him.

Q. Was the amount of the price mentioned in the telegram? A. No.

Q. Then the only price that you knew of was \$19,000 for the [132] machinery and equipment and \$6,000 for the buildings?

A. That is right.

Q. Now, then, you made the fourth trip in, did you not, with the equipment? A. Yes.

Q. About how many days was it from the third trip that you came back with the equipment?

(Testimony of Kenneth D. Lambert.)

A. Oh, it must have been two or three days anyway.

Q. Now, in the interim between the first trip and the third or fourth trip, do you know whether or not Ted Rowell had tried to get the United States Marshal to dispossess Mr. Agostino there?

A. Yes, he did.

Q. And do you know whether or not the United States Marshal came down there?

A. No, he didn't.

Q. Do you know what happened or took place between Ted Rowell and the United States Marshal?

A. Well, as I was informed on that, the Marshal——

Mr. Boochever: Object to that as hearsay.

The Court: Objection sustained.

Q. (By Mr. Bell): Who were you informed by? A. Mr. Rowell.

Q. Then what did Ted Rowell tell you? [133]

A. Mr. Rowell told me that the Marshal——

Mr. Boochever: Object, Your Honor.

The Court: Objection sustained.

Mr. Bell: It is the manager of the defendant company.

The Court: Objection sustained.

Mr. Bell: Exception. Let me make an offer, then? Do you want me to make it out of the presence of the jury? I offer to prove by this witness that if he were permitted to answer that Ted Rowell made a trip to Anchorage to get the United

(Testimony of Kenneth D. Lambert.)

States Marshal to put Agostino and Mr. Socha or the Barry Arm camp partners off of these premises and that an investigation was made by the Marshal and Mr. Ted Rowell and that the Marshal refused to have anything to do with it and said they were rightfully in possession. That is what Rowell told this witness.

Mr. Boochever: Same objection, hearsay.

The Court: Objection is sustained.

Mr. Bell: Exception.

Q. Mr. Lambert, so far as you know did the United States Marshal come there at all?

A. No, not to my knowledge.

Q. And did you talk to Ted Rowell after his trip to Anchorage?

A. I didn't know that Mr. Rowell came to Anchorage.

Q. Well, did you talk to Ted Rowell after his conference with the United States Marshal? [134]

A. Yes.

Q. Now, then, what did Ted Rowell tell you to do after that?

A. Well, we didn't do anything we called Mr. Morgan on that. He didn't tell me anything to do.

Q. And you called Mr. Morgan? A. Yes.

Q. And where did you call Mr. Morgan?

A. Well, I think it was at Juneau, either called him or sent him a wire, I don't recall what it was now.

Q. Did you inform Mr. Morgan that Agostino re-

(Testimony of Kenneth D. Lambert.)

fused to move? A. Yes.

Q. And then what did Mr. Morgan say?

A. That was the time Mr. Morgan said he would come up and settle—make some settlement with Mr. Agostino.

Q. Then, after that happened did you go back to Agostino? A. Yes.

Q. Did Mr. Rowell go with you? A. Yes.

Q. And did you have a conversation with Mr. Agostino there? A. Yes.

Q. Can you give us approximately the date of that conversation?

A. Well, it is pretty hard. It was sometime in the latter part of March.

Q. Was that there at Barry Arm camp?

A. That was at Barry Arm, yes. [135]

Q. Tell us what was said there between you, Mr. Agostino and Ted Rowell.

A. Well, we informed Mr. Agostino that Mr. Morgan would be up and make some settlement with him. Mr. Agostino said "Go ahead and move in," he would give us free access to the camp ground and everything.

Q. Did you, from your conversations with Mr. Morgan and all of the parties understand that you were to be given possession?

Mr. Boochever: Object to this as leading.

Mr. Bell: At that time—I will withdraw it.

Q. Tell what he said about giving you possession of the premises?

(Testimony of Kenneth D. Lambert.)

A. He just stated we could have possession of all the premises if Mr. Morgan was coming up to make a settlement with him.

Q. There was no other price mentioned except the one you have testified about?

A. That is the only one I know of.

Q. Now, then, did you take possession?

A. Yes.

Q. Now, were you acting for yourself or Columbia Lumber Company at that time?

A. I was acting for the Columbia Lumber Company.

Q. Were you a regularly paid employee of the Columbia Lumber Company at that time?

A. Yes. [136]

Q. Now, after you took possession, what did you do, Mr. Lambert?

A. We unloaded the bunkhouses, and started falling timber, getting ready to log.

Q. And how long did you stay there on the premises after that? A. I stayed until July.

Q. Do you remember approximately what date in July?

A. I think I terminated my contract with the Columbia Lumber Company on the 14th of July.

Q. After that time did you cut timber there for the Columbia Lumber Company? A. No.

Q. At that time you left the Columbia Lumber Company? A. Yes.

Q. Now, had you previous to that time entered

(Testimony of Kenneth D. Lambert.)

into a contract down in Seattle, Washington, for cutting of some timber for the Columbia Lumber Company?

A. Yes, I had, that was in February. I signed a contract with the Columbia Lumber Company in February.

Q. When were you to start cutting the timber for them under the terms of that contract?

A. I think—my production was to start on the 15th of April.

Q. Then, after you did take over this equipment, did you go ahead then with your written contract with them? A. Yes. [137]

Q. And, as I understand, you cut under the written contract then until the time you left there?

A. Yes.

Mr. Davis: Your Honor, I hate to keep objecting but my understanding is that he should ask the witness questions and let him answer.

The Court: Quite right. Objection is sustained. Counsel is requested to conform with the rules.

Q. (By Mr. Bell): Mr. Lambert, what did you take over in the way of equipment when you landed there?

A. It was four bunkhouses and a cookhouse and an A-frame and two yarders on it. You might call it a floater, it is logging equipment.

Q. Were there any bulldozers there?

A. That belonged to the Columbia Lumber Company?

(Testimony of Kenneth D. Lambert.)

Q. No, I mean that belonged to Mr. Agostino and his partner, Mr. Socha?

A. Yes, his equipment was there.

Q. What equipment did you take over from Mr. Agostino and Mr. Socha?

A. I didn't take over any.

Q. Well, you came on the ground and landed your equipment? A. Yes.

Q. Now, from that time on, all you took over was the camp? [138]

A. That was all.

Mr. Boochever: Your Honor, I think that question is ambiguous as to whether he means the Columbia Lumber camp or the Agostino and it should be clarified and I object to it on that ground and move the answer be stricken.

The Court: Overruled.

Mr. Boochever: But he asked him whether he took over the camp and there is clear evidence he landed a camp for Columbia Lumber there and if he means that he took over Agostino's camp that is an entirely different proposition and I think the point should be clarified and that the question is ambiguous as it is and misleading to the jury.

The Court: It can be clarified upon cross-examination.

Mr. Boochever: Very well.

Q. (By Mr. Bell): After you landed there how long did Bruno Agostino or Mr. Socha, either—I don't think Mr. Socha was there, was he?

(Testimony of Kenneth D. Lambert.)

A. No, he was never there.

Q. Now, how long was Bruno Agostino around the place after you landed?

A. I imagine a week or two weeks, something like that, I don't remember exactly how long he was there.

Q. Do you remember where he stayed?

A. He stayed in his own cabin. [139]

Q. Now, how far is his own cabin from the Barry Arm Camp that he had been operating up to that time?

A. Well, they are right in connection.

Q. They are very near—close proximity?

A. His cookhouse and bunkhouse and cabin are right together and there is very little difference in that.

Q. And he stayed in the little cabin?

A. Yes.

Q. What happened to the warehouse and other things there following your landing?

A. I never used any of that as long as I was there.

Q. You didn't individually use any of the stuff?

A. No.

Q. Now, did you take the cats or start them or work with the cats in any way?

A. I started the cats up to inspect them to see what kind of condition they were in and that is all I used them for.

(Testimony of Kenneth D. Lambert.)

Q. Were you there on the 10th of April when Mr. Morgan came there? A. Yes.

Q. Did you hear the conversation between Mr. Morgan and Agostino on that occasion?

A. Yes.

Q. Would you please just tell us in your own words what was said by each of the parties—what you said and what they said? [140]

A. Well, Mr. Agostino offered the equipment and the camp up for sale to Mr. Morgan and I think the price he quoted him then was \$19,000 for the equipment plus \$6,000 for the buildings and Mr. Morgan refused it on that basis. He said he thought the price was too high but he did and Mr. Agostino said "Make me an offer" and Mr. Morgan said I will pay you \$300 a month rent on the equipment until such a time as it was title clear and that was about as far as the conversation went.

Q. What did Agostino say to that?

A. Well, he told Mr. Morgan to make him an offer.

Q. And that is as far as that went?

A. That is as far as that conversation went.

Q. Now, then, was there a later conversation that day with reference to starting the cats and seeing how the equipment would work?

A. Yes, there was.

Q. Who issued that order?

A. Mr. Morgan.

(Testimony of Kenneth D. Lambert.)

Q. Who did he tell that—deliver that order to?

A. To I and Mr. Agostino.

Q. And what did you do following that request?

A. Well, I started the cats up to see what condition they were in and I listed all the parts that were required to put them back in first-class shape and I gave an estimate on it of \$10,000 for the repair of the two cats. [141]

Q. That would put them back in excellent condition? A. Yes.

Q. What would be a reasonable—What does a D-8 caterpillar like those cost originally?

A. Well, originally they would cost around \$18,000 or something like that new.

Q. And what would a D-7 cost?

A. Well, a little less, possibly \$16,000.

Q. What would the donkey engine and—the donkey engine that was there cost?

A. Around \$6,000.

Q. Now, I will ask you, Mr. Lambert, if there was some blocks and lines there at the place?

A. Yes.

Q. Did you examine them? A. Yes.

Q. What would you say was the reasonable value of those blocks and lines at Barry Arm camp at that time?

A. Well, all in all, around \$1200.

Q. Now, what would you say the donkey engine was worth at the time you examined it there?

A. Oh, \$5,000, I guess, \$4500 or \$5,000.

(Testimony of Kenneth D. Lambert.)

Q. Was there a sled, a big sled on which this donkey was mounted for operating?

A. Yes. [142]

Q. And would you explain to the jury what a sled like that is?

A. Well, a donkey sled is put underneath a yarder for moving through the woods and it is quite a little job to build one of them.

Q. What are they made out of?

A. Out of logs.

Q. And are there any cross-timbers in them?

A. Yes, cross-members and bolts.

Q. What would you say that sled was worth at Barry Arm camp at that date?

Mr. Boochever: Objection. There is no qualification of this witness as to questions of value. He is not qualified to give any estimates as far as we know.

The Court: Objection is sustained until the witness is qualified.

Mr. Bell: I will qualify him.

Q. Mr. Lambert, how long have you been engaged in the logging business?

A. Approximately 20 years.

Q. And all during that time have you operated logging equipment and machinery similar to the equipment used at Barry Arm? A. Yes.

Q. Are you familiar with the value of equipment like the equipment had there by the plaintiffs in this case? [143]

(Testimony of Kenneth D. Lambert.)

A. Yes, I have a little knowledge of it.

Q. And would you please tell us the value of the sled there, in your opinion, the reasonable market value of that sled at the place it was there for the purpose for which it was being used?

A. Well, it cost approximately six to eight-hundred dollars to build a sled of that type.

Q. Was this one in good condition?

A. Yes.

Q. Now what would you say would be the reasonable market value of those two caterpillars at that time considering the location of them on the grounds where you wanted them for use at that time and their actual reasonable market value at that place?

Mr. Boochever: Your Honor, I object to that question as being partially containing a negative pregnant and containing two or three submatters at the same time.

The Court: Witness may answer.

The Witness: Read the question.

(Question read.)

Mr. Boochever: Your Honor, I wish to again make my objection that there is no evidence here that he wanted them for any use at all.

The Court: That part of the objection is good.

Mr. Bell: Well, I will withdraw that part from the question. [144]

The Court: What was the reasonable market value?

(Testimony of Kenneth D. Lambert.)

The Witness: Well, those two cats—reasonable market value for those—those being of an RD series—those being built—that would make them be worth approximately \$5,000 apiece, somewhere in that neighborhood.

Q. (By Mr. Bell): Did you see the sawmill there? A. Yes.

Q. What, in your opinion, was the reasonable market value of that sawmill?

A. I have no knowledge of sawmills at all. I would hesitate to set any value on that.

Q. Did you examine the tools and drill-press and vice and anvil and the miscellaneous tools there? A. Yes.

Q. What would be the reasonable market value of them?

A. Well, I would say all in all the lot that was all in the shop would be around a thousand dollars.

Q. Did you observe the boom logs there?

A. Yes.

Q. About how many were there? .

A. I would hesitate to say how many there were there.

Q. Just estimate, would you tell us?

A. There could have been around twenty, I imagine.

Q. And did you notice whether or not they had chains? [145]

A. Some had chains and some didn't.

(Testimony of Kenneth D. Lambert.)

Q. Now, what would be the reasonable market value of the logs and chains—the boom logs and chains that you saw there?

A. Well, chains are worth around \$7 apiece but I don't know how many chains was there. I have no knowledge of that at all. And the boom logs, why they are only worth about the scale that is in them.

Q. About how much board measure lumber would they scale?

A. Around 700 feet, I would imagine.

Q. What was the lumber worth per thousand—logs worth per thousand at that place?

A. \$21.

Q. What would you say, then, would be the reasonable market value of the boom logs and the chains there that were at the place?

A. Well, that is pretty hard to say what the market value of them would be. It would depend a good deal on the condition of the sticks.

Q. Did you notice the roads that were built there? A. Yes.

Q. Did you go over all of those roads?

A. No, just one of them is all.

Q. And do you know how many others there were that were in the clearings there?

A. Yes, there was three or four roads in there or some branch [146] roads off of there—short roads.

Q. Do you know approximately the cost of

(Testimony of Kenneth D. Lambert.)

building logging roads in the logging woods similar to these?

A. Well, it runs pretty high, around a hundred dollars a station.

Q. Around a what?

A. Hundred dollars a station.

Q. What is a station? A. Hundred feet.

Q. About a dollar a foot, then?

A. About a dollar a foot, yes.

Q. Do you know whether or not the bunkhouse was furnished with some beds, mattresses and springs?

A. Yes, there was some springs in there and some mattresses.

Q. Do you know what 250,000 feet of board measure logs would be worth to a man operating a logging business similar to the one they were operating there? What would be the profit in other words out of 250,000 feet of board measure timber standing?

A. Board measure standing?

Q. Yes.

A. That would depend on his method of logging and how much it was going to cost him to take that timber out. It would be pretty hard to estimate until you saw the tract of timber.

Q. Did you see the tract of timber that Bruno had left standing there? [147] A. Yes.

Q. Was that good or bad?

A. It was a fair stand.

(Testimony of Kenneth D. Lambert.)

Q. And was it available? A. Yes.

Q. Now, what would that be worth to a logging man equipped like Bruno was there?

A. Well, it would be worth quite a bit to him. I would hesitate to say how much he would make off of it. It would depend on his method of logging.

Q. What were trap logs selling for at that location at that time?

Mr. Boochever: I object to that question. There is no evidence about trapped logs.

The Court: Objection sustained.

Q. (By Mr. Bell): Were there any of that timber that would make trap logs?

A. Some of it would.

Q. About what portion of that 250,000 feet would make trap logs?

A. Possibly ten-percent of it.

Q. And do you know what the price of trapped logs were at that time at that location.

A. No, I don't.

Q. Do you know what they were when you started cutting there, [148] do you know what they would bring then, which was a month later?

A. Around \$45 a thousand.

Q. And what was the market value there at this location of ordinary logs—lumber—logs for lumber at that location?

A. \$21 a thousand was what I was getting.

Q. \$21 a thousand?

(Testimony of Kenneth D. Lambert.)

The Court: Where was that—standing or in the water?

The Witness: In the water.

Q. (By Mr. Bell): Did you have to pay anything to the Government or were you getting \$21 a thousand for cutting timber that the Columbia Lumber Company had acquired?

A. The Columbia Lumber Company paid the stumpage.

Q. And you got \$21 a thousand for cutting it and putting it in the water?

A. And rafting it, yes.

Q. Do you know whether or not there was a light plant there at this place?

A. There was a little plant there.

Q. Electric light plant?

A. There was a little battery charger that could be used as a light plant if you packed just a few globes.

Q. It was being used so far as you know there?

A. Yes.

Q. Do you know whether or not there was some oil—fuel oil [149] or diesel oil and some gasoline there?

A. Yes, I borrowed six barrels of oil from Mr. Agostino, also a barrel of gasoline.

Q. And those were used? A. Yes.

Q. Mr. Lambert, after you located there did you ever have any obstruction in any way from

(Testimony of Kenneth D. Lambert.)

Agostino from the use of everything there?

A. No.

Q. Did you feel free to go upon the premises at any time and use anything that you wanted to use?

A. Yes.

Q. Do you know when the cats were put in use?

Mr. Boochever: Object to that as leading.

The Court: Overruled, if they were put in.

Q. (By Mr. Bell): Yes, if they were put in?

A. One of the caterpillars was put in use the day I left. That was all I knew about it.

Q. And that was in July? A. Yes.

Q. Of 1948? A. 1948.

Mr. Boochever: We have no objection to this.

The Court: Is it offered in evidence? [150]

Mr. Bell: It is offered in evidence now.

The Court: Without objection the paper marked for identification as Plaintiff's Exhibit No. 34 is admitted in evidence under that number and may be read to the jury.

Mr. Bell: Barry Arm Cruise.

This area was cruised by Lambert and Rowell on November 10, 11, 12th, 1947. They went up the valley from the protected slough, a distance of 3 and 1/2 miles on the westerly side of the river. The timber extends a distance of 1,000 to 3,000 feet from the river and for the full distance of 3 and 1/2 miles. It is predominately spruce but has a heavy percentage of hemlock, possibly twenty-percent in the complete stand. The timber is the

(Testimony of Kenneth D. Lambert.)

finest that has been located or cruised by our organization and is thick and the terrain is practically free from brush.

At the head of the area is a large flat, possibly a mile square, which contains a large portion of this timber and which is easily logged. The total volume of the area cruised will run around fourteen million feet.

In addition to this area located over on the east side of the river is additional timber of a smaller sized timber and the area is not so great as the west side. This was not looked at thoroughly but is believed to be several million additional timber on the east side of this river.

Close examination proved that these logs could be floated down this slough with a little preliminary work. [151]

The ground aside from a little soft muskey is gravel and easy traveling for either cat or truck.

This area is protected on all sides from severe storms and the timber is particularly free from cat faces, wind checks, and severe rot.

The method of logging recommended is cold decking with yarders to the spar tree and swung with cats to the slough. Lambert's recommendation is a D-8 cat and arch for each cold deck machine as production could be increased considerably by this method.

This area would be a two or three-year location for camp one equipment, if equipped with cat and

(Testimony of Kenneth D. Lambert.)

arches, as they both are of the opinion winter logging could be done because of the protected nature of the area.

Rafting is at all times protected and with the driving of ten to twelve piling would be a simple matter to raft with the outgoing tide as the slough is from 8 to 10-feet deep depending upon the height of the tide. The tide goes up this slough for a distance of a mile and half. These rafts when completed could be pulled with the camp boat right out through the middle of this stiff boom and tied to a buoy and wait the arrival of the tug boat. Lambert recommends a full crew of the two present donkeys and two cats and arches with ten men on the cutting crew, making a total of 36 men for the camp. With this crew and additional equipment, he says he can guarantee 60,000 daily [152] or 360,000 per week every week. This area can be started by March 15th and the suggestion is that if the sale can be consummated arrangements be made to start moving the camp and machines in to cold deck, pending the arrival of cats and arches on the LCT around 4-1-48. This is by far the best timber and the best logging show yet visited on the west side of Prince William Sound.

Q. (By Mr. Bell): Mr. Lambert, after you started logging there did you find conditions just like you had reported it to them before?

(Testimony of Kenneth D. Lambert.)

A. Yes, they were similar.

Q. And was the timber good at this place?

A. Yes.

Q. Was there any way for two outfits to operate there without one blocking the other?

A. No.

Q. It had to be one exclusive operation?

A. That is right.

Q. And so long as the Barry Arm camp or the plaintiffs in this case were operating, the other people—the other operators—could not get in, is that right?

Mr. Boochever: Your Honor, the same objection I have been making on leading the witness.

Mr. Bell: I will withdraw the question.

Q. Were there any opportunity for other people to get in [153] there so long as Barry Arm camp was operated? A. No.

Q. Mr. Lambert, was the pond, what we call the pond, that Mr. Agostino has been describing to us, was that used for logs by you? A. Yes.

Q. Now, will you describe that pond to the jury?

A. Well, the pond was a little body of water that he had staked with piling all the way around. It was a place to raft his logs in and it was approximately about eight-feet of water in there; at a high tide it was very good rafting ground.

Q. Now, in operating there how did you put the logs in that pond? A. With a cat.

(Testimony of Kenneth D. Lambert.)

Q. And then after you got them in there what did you do with them?

A. We rafted them, put them in a boom.

Q. Would you please tell the jury what you mean by putting them in the boom?

A. Well, a raft of logs are logs that are put up in sections with boom sticks around them for towing to the mill.

Q. Did you do that right along for the Columbia Lumber Company there? A. Yes.

Q. Did they take the logs away? [154]

A. Yes.

Q. About how many feet of logs were taken out at the time you left there in July?

A. Well, I don't remember now off-hand how much I did take out.

Q. Do you know how much was cut up to that time?

Mr. Davis: Now, Your Honor, this is completely irrelevant to the issue of this case. I move that the witness not be allowed to answer that question until clarified.

The Court: I do not see the relevency.

Mr. Bell: All right, Your Honor, I am not pushing.

Q. Do you know whether or not the Columbia Lumber Company had made a purchase of timber up Mosquito Creek prior to your landing there?

A. I understood they had.

(Testimony of Kenneth D. Lambert.)

Q. Do you know whether or not that purchase was made before or after you landed?

A. I understood it was made before I ever went in there.

Q. And do you know how far up Mosquito Creek this purchase extended?

A. I think it was around three miles.

Q. And how far up had you logged off for them at the time you left?

A. At the time that I left——

Mr. Davis: Your Honor, the same objection. I think it [155] has no relevance to this case at all.

The Court: Objection sustained.

Mr. Bell: Exception.

The Court: Exception is noted.

Q. (By Mr. Bell): Mr. Lambert, is Mosquito Creek a navigable stream?

A. No, it would be for rowboats or something like that.

Q. When you started logging there did you log over the 250,000 foot area that Bruno Agostino held?

Mr. Boochever: Object to that question as not being clear what they mean by "logging over"—did he log that area?

Q. (By Mr. Bell): All right, did he log that area?

A. I have no knowledge of knowing what that area is. The Forest Service had never put out any boundaries—any boundary lines there. I un-

(Testimony of Kenneth D. Lambert.)

derstood that the Columbia Lumber Company had a sale.

Q. Did you start at the boundary of the logging woods that had been logged by the Barry Arm people and go on up?

A. Yes, I started right at their last cutting and went from there right on up.

Q. It was a continuous operation?

A. That is right.

Mr. Bell: I think that is all, Your Honor.

The Court: Court will stand in recess until five minutes [156] past three.

(Short recess.)

The Court: The record without objection will show all members of the jury are present. Counsel may proceed.

Cross-Examination

By Mr. Boochever:

Q. Mr. Lambert, I understood you to say that you went up there in March of 1948 up to Barry Arm, is that right, sir? A. Yes.

Q. And at that time you were under a contract with Columbia Lumber Company, is that right?

A. I had signed a contract for them but I at that time was working for wages.

Q. Did you have a contract for wages at that time?

A. No, but I was paid by wages. It was a verbal contract.

Q. With whom? A. With Mr. Morgan.

(Testimony of Kenneth D. Lambert.)

Q. Were you on the Company's payroll?

A. Yes.

Q. And you were paid wages from the Company payroll? A. Yes.

Q. Are you sure of that, Mr. Lambert?

A. Yes.

Q. I want to show you your contract here to refresh your memory, see if you can recognize this document here, sir? [157]

A. (No response.)

Q. Can you identify that document?

A. Yes, that is the contract we signed in Seattle.

Mr. Boochever: At this time I wish to move that this contract be introduced into evidence as Defendant's D.

Mr. Bell: We have no objection.

The Court: Without objection the document may be received as Defendant's Exhibit D and may be read to the jury.

Mr. Boochever: "This contract, entered into between the Columbia Lumber Company of Alaska, hereafter referred to as the Company, and K. D. Lambert, hereafter referred to as the Contractor, . . ."

Q. Are you the one known as K. D. Lambert in this contract? A. Yes.

Mr. Boochever: ". . . is for the purpose of logging for the Company at the Barry Arm site, or other places as designated later, in the Prince William Sound area.

(Testimony of Kenneth D. Lambert.)

“The Company is to turn over to Contractor the complete camp and equipment, known as Camp One, for the express purpose of producing logs to no one but the Company. The terms and conditions of this operation are to be as follows:

“1. The Company hereby agrees that so-called Camp One will be completely equipped, including a camp boat, and other necessary tools and equipment, for the proper production and full operation.

“2. The Company agrees that they will furnish roofing paper and other incidentals necessary to put the camp in livable condition after it is located on a permanent footing. The Company also agrees that they will purchase proper mattresses, blankets, etc., for the camp as well as necessary cooking utensils.

“3. The Company further agrees that the equipment will be in operating condition and will be equipped with new lines and blocks necessary for efficient production of logs.

“4. The Contractor agrees that he will use care and discretion in the operation of this machinery and will see that the machinery is in the same condition at the end of the season as at the start, reasonable wear and tear excepted, or financial provisions made for this repair and overhaul work.

“5. The Contractor agrees that \$2 per M shall be held out for the repurchase of blocks, lines, parts, and other equipment that might have to be replaced in the season.

“6. The Contractor agrees that all costs of log-

(Testimony of Kenneth D. Lambert.)

ging will be chargeable to his account except stumpage.

“7. The Contractor agrees to be charged with \$100 per month for bookkeeping work in the office at Whittier.

“8. The Contractor agrees to maintain a production of at least 50M per day six days per week from April 15 forward to the end of the season.

“9. The Contractor further agrees, in explanation of above [159] Paragraph No. 6, that transportation costs and all other expenses incurred towards getting crews and supplies, will be charged to him, aside from the freight saved by LCT delivery.

“10. It is mutually agreed that a price of \$21 for these logs be paid Contractor, based upon the Forest Service Scale, properly rafted and moored for the company tug to tow. This, less the above-mentioned \$2 deduction, is to be paid on the net Forest Service Water Scale, on the 10th of the month following delivery.

“11. It is mutually agreed that the Company will work with Contractor regarding the towing of boom sticks and moving of rafts after being finished at camp.

“12. It is mutually agreed that the \$2 per M deduction will be returned to the Contractor at the end of the season, less whatever cost is necessary to put the camp equipment and supplies in proper condition.

(Testimony of Kenneth D. Lambert.)

“13. It is mutually agreed that the Company will charge groceries, provisions, and supplies to the Contractor at laid down Whittier cost plus 10% and that shipping tickets or invoice charges shall accompany each and every delivery to said camp. It is also mutually agreed that this is a local condition that must be worked out between the two parties.

“Agreeing to the above conditions and terms of contract, both parties hereto set their hands this 16th day of February, 1948. [160]

“(signed) Geo. W. Morgan, Columbia Lumber Company of Alaska; (signed) K. D. Lambert, K. D. Lambert, Contractor; (signed) C. M. Ring, Witness.”

Q. (By Mr. Boochever): Now, Mr. Lambert, in conformity with that contract you hired your own men, did you, to go up there and log for you?

A. Yes.

Q. And you were the boss of those men and in charge of them and could fire them and tell them what to do, is that right? A. Oh, yes.

Q. No one came in and said you do this, that or the other thing with regard to the details of the work? A. No.

Q. Now, you were to start producing as of April 15th under that contract? A. Yes.

Q. And, of course, that would necessitate about a month's preparation, wouldn't it? A. No.

(Testimony of Kenneth D. Lambert.)

Q. About how long would that take, Mr. Lambert?
A. Two weeks.

Q. And so you were up there at the end of March there for the purpose of getting ready, is that right?

A. No, for the purpose of moving the camp and the A-frame from Hobo Bay to Barry Arm. The camp and the A-frame, they [161] were about to sink. They were covered by ice and snow. That was what I was sent there for was to get them out.

Q. So you moved those over, is that right?

A. Yes.

Q. The first time you went over there Mr. Agostino wouldn't let you land, is that correct?

A. I went there without the camp. I went there with the boat first.

Q. He told you he would not let you land?

A. Yes.

Q. Isn't it a fact he told you if your men tried to land he would shoot you?
A. No.

Q. Did he make it to some of your men?

A. Not to my knowledge.

Q. Then you subsequently went over again with Mr. Rowell, is that right?
A. Yes.

Q. And at that time he again said he wouldn't let you land, is that correct?
A. Yes.

Q. And then you went back and informed Mr. Morgan about it and said you couldn't land, this man wouldn't let you land?
A. That is right.

Q. And Mr. Morgan said, he said—and then

(Testimony of Kenneth D. Lambert.)

did you notify [162] Mr. Agostino that Mr. Morgan would come up to discuss it with him?

A. Yes.

Q. You have never had authority to make——

The Court: I think counsel ought to quote the words.

Q. (By Mr. Boochever): What was the message that you took back from Mr. Morgan?

A. The message I took from Mr. Agostino to Mr. Morgan?

Q. From Mr. Morgan to Mr. Agostino?

A. That he would be up on the 10th of the month.

Q. For what purpose?

A. To make some necessary provision or arrangement, whatever you like, for purchase of his equipment.

Q. Mr. Morgan did not state that he was purchasing equipment at that time, however?

A. No, he did not. He said he would come up and make arrangements.

Q. Then, subsequently, Mr. Morgan came up in April, is that right? A. That is right.

Q. Around the 10th of April?

A. 10th of April.

Q. And in your presence with Mr. Agostino, Mr. Morgan discussed the possible purchase of that equipment, is that right? A. Yes. [163]

Q. And at that time did Mr. Agostino offer the equipment for purchase? A. Yes.

(Testimony of Kenneth D. Lambert.)

Q. And what price did he offer it for?

A. \$19,000 for the equipment and \$6,000 for the buildings.

Q. Did Mr. Morgan accept or reject that offer?

A. Neither one.

Q. What did he say?

A. He offered him \$300 a month rental.

Q. Did he say that he would buy the equipment for that price—in regard to the \$19,000 and \$6,000, I believe you said before, Mr. Lambert, that he said that was too high a price?

A. He did say it was too high.

Q. So he never accepted that offer?

A. He never accepted the offer.

Q. So he made a counter-offer to lease the equipment for \$300 a month, is that right?

A. Until such time as the title was cleared up.

Q. Did Mr. Agostino accept that offer?

A. No, he demanded a third down.

Q. And that was the end of the negotiations, is that right?

A. Until such time as the cats were inspected.

Q. Were the cats inspected? A. Yes.

Q. What did you find about the cats about how much it would [164] take to put them in running order? A. \$10,000.

Q. And at that time Columbia Lumber already had cats there at Barry Arm of their own?

A. One cat, yes.

(Testimony of Kenneth D. Lambert.)

Q. Which was suitable to be used in logging, right? A. One cat.

Q. And the Columbia Lumber had its own buildings there, had it not? A. Yes.

Q. Which you, as an independant contractor, took there and were operating, right? A. Yes.

Q. From April 15th on you operated as an independent contractor, is that correct?

A. That is correct.

Q. And not as an agent of Columbia Lumber in any sense of the word? A. That is right.

Q. Mr. Lambert, you said that Mr. Agostino said you could go ahead and take possession, when was that?

A. That was before we took the camp in; that was sometime in March.

Q. Sometime in March? A. Yes. [165]

Q. You went in and you landed your camp—the Columbia Lumber Camp as I understand it—in the pond, is that correct? A. Yes.

Q. And you landed it there at the end of the pond? A. Right.

Q. You did not go over into Agostino's camp at that time and use his camp, did you?

A. No.

Q. You never took possession of that?

A. Only his roads; I used his roads.

Q. You used the road over his lands and that is the only thing you did with regard to his property at all? A. That is right.

(Testimony of Kenneth D. Lambert.)

Q. Now, there was some talk about Mr. Rowell trying to get the Marshal, isn't it true that he tried to get the Marshal so that you could land there, that was what he wanted the Marshal for not to eject Mr. Agostino, to see that Mr. Agostino would let you land?

A. Yes, I guess that was it. He wanted to get permission to get in there on the land.

Q. And that was why he wanted the Marshal there so there would be no fight about getting in on the ground, isn't that right?

A. He tried to get the Marshal to come out and evict Mr. Agostino.

Q. You aren't sure on that? [166]

A. Yes, I am sure.

Q. Wouldn't Mr. Rowell's testimony be controlling in your mind what he did on that?

A. Yes, it would.

Q. Now, you said something about starting the cats there and inspecting them, that was on April 10th I believe when Mr. Morgan was there or about that time? A. Yes.

Q. Was that done with Mr. Agostino's permission? A. Yes.

Q. And that was to inspect them to see about a possible purchase, is that right?

A. Yes, to see how much work it would take to put them in condition.

Q. And that was when you felt it would take

(Testimony of Kenneth D. Lambert.)

\$10,000's worth of work to put them in position to use? A. Yes.

Q. You did all your logging and all without the use of Mr. Agostino's cat at all?

A. That is right.

Q. And you got along using the equipment that Columbia Lumber furnished you?

A. The best I could with one cat, yes.

Q. Now, the timber you cut you understood was timber Columbia Lumber had the right to cut, is that right? [167]

Q. And you have never cut any timber knowingly or willingly that belonged to anyone else, is that right? A. Yes.

Q. And Columbia Lumber never gave you authority to cut anyone's timber? A. No.

Mr. Boochever: That is all, Your Honor.

The Court: Any further redirect examination?

Mr. Bell: Yes.

Redirect Examination

By Mr. Bell:

Q. Mr. Lambert, you testified that you worked for the Columbia Lumber Company up until you went to work on your own contract did you not?

A. Yes.

Mr. Davis: Your Honor, I don't think he testified, at any rate the question is leading.

The Court: Objection is sustained. Ask him whether he so testified?

(Testimony of Kenneth D. Lambert.)

Q. (By Mr. Bell): Did you testify that you worked for the Columbia Lumber Company up to the time that you went to work under your contract there? A. Yes.

Q. Did you testify that you were paid a salary from the Columbia [168] Lumber Company up until the time you went to work under your contract? A. Yes, up to the 1st of April.

Q. Were you paid in a check? A. Yes.

Q. Mr. Lambert, I hand you a paper that has been marked Plaintiffs' Exhibit Identification No. 36 and ask you to state, if you know, what that is?

A. Yes, that is a statement from my check.

Q. Now, was that a part of the check that was given to you, was that attached to the check at the time it was given to you? A. Yes.

Q. Is that what is commonly referred to as a voucher? A. Yes, that is a voucher.

Q. And who delivered that to you?

A. Columbia Lumber Company.

Q. Now, I hand you a paper that is marked Plaintiffs' Exhibit Identification 35 and ask you to examine that?

A. Yes, this is for the month of March.

Q. Who did you receive that from?

A. Columbia Lumber Company.

Q. And is it in the same condition it was at the time you received it with the exception of the Clerk's marks? A. Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Bell: We now offer in evidence Identifications 35 [169] and 36.

The Court: Is there objection?

Mr. Boochever: No objection.

The Court: It may be admitted and may be read to the jury.

Mr. Bell: Identification 35:

“Columbia Lumber Co. of Alaska, Whittier, Alaska, Remittance Advice (Detach this stub before depositing), 184 hrs. at 3.00-552.00; 32 hrs. at 4.50-144.00—696.00. Employee K. D. Lambert, Pay period ending 3/31/48, Date of check 4/8/48, total wages 696.00, Social Security 6.96, Withholding tax 93.70, Mess & Com 88.35, 10.80, Total deductions 199.81, Net amount 496.19.”

Mr. Bell: Identification 36. Same heading.

“48 hrs. at 3.00-144.00, 8 hrs. at 4.50-36.00—180.00, Employee K. D. Lambert, Pay period ending 2/29/48, Date of check 3/31/48, total wages 180.00, Social Security 1.80, Mess & Com. 45.25, 2.55, total deductions 49.60, net amount 130.40.”

Mr. Bell: Mr. Lambert, will you please tell the jury what those two checks were given you for?

A. They are wages for moving the camp from Hobo Bay to Barry Arm.

Q. What was the last date you worked for them in that operation?

A. It was the 31st day of March. [170]

Q. And you did work for them then all the time stated in those checks? A. Yes.

(Testimony of Kenneth D. Lambert.)

Q. Now, were there other checks issued?

A. No.

Q. Those two were all you received?

A. Yes.

Q. And during that period of time were you engaged in their business or your business?

A. In their business.

Q. One other thing, Mr. Lambert, you were asked a question—Did you cut only timber belonging to the Columbia Lumber Company—and you stated you did. Would you state what you mean by that, explain that?

A. Well, it is my belief the Columbia Lumber Company had purchased all of the timber in that area.

Q. Did that include the timber belonging to these plaintiffs?

A. Yes, and included the entire sale to my knowledge.

Q. And that is what you meant then by saying that you cut only timber belonging to them?

A. Yes.

Q. Then, as I understand, then, from the time you landed there on you were under the impression or at least believed that the Columbia Lumber Company had bought out Mr. Socha and Mr. Agostino? [171]

A. That is right, yes.

Q. Now, there is one other thing—

Mr. Boochever: Your Honor, I object to that

(Testimony of Kenneth D. Lambert.)

last question as leading and move that the answer be stricken.

The Court: It is too late. Motion denied. The question was asked and answered without objection.

Mr. Davis: He didn't have a chance to object before he answered it.

The Court: There was a perceptible lapse of time between the question and the answer and it was only after that that the motion comes in.

Q. (By Mr. Bell): Mr. Lambert, there was a statement in the contract between you and the Columbia Lumber Company that was read by opposing counsel, it is paragraph 8 of the contract, would you please read that and explain to the jury what that paragraph meant?

Mr. Davis: Your Honor, I believe that the paper itself speaks for itself and I don't believe that the witness should be allowed to testify as to what it means.

The Court: Objection is sustained.

Q. (By Mr. Bell): Mr. Lambert, I believe your contract states that you are to start on the 15th of April, did you start at that time or before?

Mr. Boochever: I object to that question. Your Honor, [172] the contract speaks for itself and it doesn't say that.

Mr. Bell: I will read it and ask him if he did. "The Contractor agrees to maintain a production of at least 50M per day, six days per week, from April the 15th forward to the end of the season."

(Testimony of Kenneth D. Lambert.)

Did you start work on April 15th or did you start at some other period?

A. I started falling timber on the 6th day of April.

Q. From then on you were on your own as a contractor? A. Yes.

Q. You testified you started in working with only one cat, what was the agreement between you as to how many cats you were to have?

A. Two.

Q. And do you know where the other cat was that was to be furnished to you?

A. No, I don't, it was sold in Seattle sometime or other.

Q. Did they have any other cat in that vicinity other than the one you were using except what interest, if any, they had in the caterpillars belonging to the plaintiffs?

Mr. Boochever: Your Honor, I object to this as new matter and not proper redirect.

The Court: Overruled, you may answer.

The Witness: Would you read the question.

(Question read.)

A. No, they didn't. [173]

Mr. Boochever: I must object to that question, too, because it implies that they had an interest in the plaintiffs' caterpillars and that is a double question. I move that the answer be stricken.

The Court: I didn't understand all that question said.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: The question was "Did they have any other cat in the vicinity except the interest they had in the plaintiffs' cat?" Now the question was a double question and a trick one for that reason because it implied they had an interest in the plaintiffs' cats.

The Court: I remember the question and he said " * * * the interest, if any * * *."

Q. (By Mr. Bell): Did you recommend a D-7 cat or D-8 cat? A. D-8.

Q. Did they furnish you any D-8 cat there?

A. No.

Q. Was it only—Was the only D-8 cat that was in the vicinity of the mouth of Mosquito Creek or the Barry Arm area the cat that was originally owned by the plaintiffs in this action?

A. Yes.

Mr. Bell: That is all, then, Mr. Lambert.

The Court: Any further cross-examination?

Mr. Boochever: Yes, Your Honor.

Recross-Examination

By Mr. Boochever: [174]

Q. Now, in regard to the property of Agostino and Socha, Columbia Lumber in your knowledge and while you were there never purchased that property, is that right? A. That is right.

Mr. Boochever: That is all.

Further Redirect Examination

By Mr. Bell:

Q. Mr. Lambert, did you understand his ques-

(Testimony of Kenneth D. Lambert.)

tion as to whether or not that there was a purchase of this property?

A. Well, there was never any money paid down on it. To my knowledge the purchase had never went through. If it had of went through I would have used Mr. Agostino's cats.

Q. Did you understand his question when he said there was no purchase?

A. Well, there was no purchase as far as I know unless they would actually come out and paid Mr. Agostino. That would of been a purchase, wouldn't it?

Q. Did you understand that there was an agreement to purchase?

A. There was an agreement to.

Q. There was an agreement to pay for it?

A. Right, as far as I know there was never any set price on it but there was an agreement.

Q. Now, in your conversation with Mr. Morgan on the telephone or in the telegrams that you and Mr. Ted Rowell sent him, was the price made known to Mr. Morgan? [175] A. Yes.

Q. And after that was made known to him just tell the jury what Mr. Morgan said for you to do?

A. He sent a wire up and informed I and Mr. Rowell to tell Mr. Agostino that he would be up sometime on the 10th of the month and make arrangements with him for some kind of a settlement.

Q. For some kind of a settlement?

A. That is it.

(Testimony of Kenneth D. Lambert.)

Q. Now, do you remember whether or not the \$8,000 cash and part payments for the rest was mentioned in that conversation?

A. What was that?

Q. Do you remember whether or not the \$25,000 that was discussed with Mr. Morgan was for all cash or \$8,000 of it in cash and the balance for payments?

Mr. Boochever: That is leading, your Honor, and object to it.

The Court: Objection sustained.

Mr. Bell: Exception.

Q. Do you remember how or what was said between you, Mr. Rowell and Mr. Morgan about how the purchase price was to be paid?

A. You mean over-the-phone conversation?

Q. Yes, sir. A. No, I don't. [176]

Q. Were you present at any time when Mr. Morgan made any statements about how it was to be paid? A. No.

Q. Well, do you know what was discussed between Mr. Agostino and Mr. Morgan on April 10th, did you hear that conversation? A. Yes.

Q. Now, was that a part of the conversation there as to how the \$25,000 was to be paid?

A. Mr. Agostino gave him the price of \$25,000 for the entire lot and Mr. Morgan said it was too much, and through further discussion Mr. Agostino told Mr. Morgan to make me an offer and Mr. Morgan offered him the \$300 a month rental on the

(Testimony of Kenneth D. Lambert.)

equipment and Mr. Agostino said he couldn't accept that, that he had to have a third down before he could get a clear title to the property, and that was the extent of the conversation.

Q. And did that conversation prolong any farther at that time?

A. Not to my knowledge, no.

Q. Then, what—how soon after that was it that Mr. Morgan told you to start the machinery and see how it worked?

A. It was sometime later in the afternoon.

Q. But on the same date? A. Same date.

Q. And on the same visit? A. Yes.

Q. And you were already in there and landed at that time and [177] had started your falling timber, hadn't you?

Mr. Davis: Your Honor, that question is definitely leading and I object to it.

The Court: Objection is sustained.

Q. (By Mr. Bell): I will ask it again. Were you already in there at that time? A. Yes.

Q. And had you started falling timber before that time? A. Yes.

The Court: Any further cross-examination?

Further Recross-Examination

By Mr. Boochever:

Q. Were you using Mr. Agostino's equipment before that time? A. No.

Mr. Boochever: That is all.

(Testimony of Kenneth D. Lambert.)

Further Redirect Examination

By Mr. Bell:

Q. Where were you putting the logs?

Mr. Boochever: I object to that as improper re-redirect.

The Court: We have crossed back and forth often enough.

Mr. Bell: He has raised that question. We have got to ask about that pond.

The Court: All right, counsel may proceed. [178]

Q. (By Mr. Bell): Were you using the Barry Arm camp pond? A. Yes.

Mr. Boochever: Object to—implying as to the—there is no evidence as to the pond belonging to any camp.

The Court: Overruled.

Q. (By Mr. Bell): I didn't understand your answer?

A. Yes, we were using the pond.

The Court: No matter whether it is the Barry Arm pond or some other pond you were using the only pond that was around there?

The Witness: That is right.

The Court: Do you wish this witness to remain in attendance the rest of the day?

Mr. Bell: I don't think we will need him the rest of the day.

Mr. Davis: We will excuse him.

The Court: You may be excused the remainder of the day but you had better come around in the morning.

(Witness excused.)

Mr. Ross: Call Mr. Socha.

STANLEY SOCHA

called as a witness herein, being first duly sworn,
testified as follows: [179]

Direct Examination

By Mr. Ross:

Q. State your full name to the Court and jury?

A. Stanley Socha.

Q. Mr. Socha, are you a partner with Mr. Bruno Agostino in the operations or were you a partner in the operations at Barry Arm camp in the logging business?

A. Yes, I was.

Q. Did you ever help or assist Mr. Agostino in constructing the camp in which you operated there?

A. Yes, I did.

Q. Was the pond in which you kept your logs there, was that a natural pond altogether?

A. It wasn't at that time.

Q. Well, explain to the Court and the jury what, if you did anything to it, you had to do to it to make it usable?

A. It was a worn-out bay filled up with logs, stumps and God knows what not before the pond was cleared up to be used as a pond.

Q. Well, did you clear it out?

A. Sure we did.

Q. How long did it take you to clear out the place that was used for a log pond?

A. Around the pond it took us from September

(Testimony of Stanley Socha.)

'til the snow left the ground, next build up the road and fixed up the pond.

Q. Did you have to use any cat? [180]

A. Yes, we had to use a cat all the time for roads and the same thing in the pond.

Q. What did it cost you to build that pond, Mr. Socha?

A. Well, I couldn't tell you right now but it took four men, rough estimate—October, November, December, January, February and March—that is about six or seven months' work to build the roads and the pond.

Q. The roads and the pond? A. That is it.

Q. Do you know how much of that time it took to build the pond part, to get the pond usable?

A. I don't remember exactly how much time we put in but we work on the pond off and on at all the time, so everytime a log we had to go back in the pond and fix up the gates.

Q. Did you have to drive any piling there in order to make the pond usable?

A. Yes, we had no pile driver so we dug our holes with a shovel on the low tides when the pond happened to be dry and we put them two in a row about three feet apart, we will say, clear across the pond and had floating logs so that they could raise up and down.

Q. So you are not able to tell the Court and the jury how much you think that it cost to build the pond?

(Testimony of Stanley Socha.)

A. I couldn't tell you, somebody can figure four men's wages and the price of a cat, rough estimate, I wouldn't do that [181] again but we will give a month's time.

Q. Month's time? A. Yes.

Q. During all the controversies or all the conversations surrounding the purchase of Barry Arm campsite by Columbia Lumber Company, were you there during any of the time when that conversation took place? A. No, wasn't there.

Q. Did Mr. Agostino have your consent to take any action he wanted to take in order to sell the Barry Arm camp to the Columbia Lumber Company? A. That is right.

Q. Were you and Mr. Agostino the owners of Barry Arm camp? A. Yes, we were.

Q. In March, 1949? A. Yes.

Q. You were the owners? A. Yes.

Mr. Ross: That is all.

Mr. Boochever: No cross, your Honor.

(Witness excused.)

Mr. Bell: We rest, your Honor.

Mr. Davis: At this time, your Honor, we would like to make some motions and I believe they should be made out of the presence of the jury. [182]

The Court: Jury may retire to the jury room until they are recalled.

Mr. Davis: If the Court please, Mr. Bell and Mr. Ross. The defendant, Columbia Lumber Company, at this time moves for a directed verdict in

this case in favor of the defendant on several different grounds.

In the first place, on the ground that the supposed contract here is apparently an oral contract within the terms of the statute of frauds, by the terms of which the defendant cannot be bound unless there was some memorandum in writing or some consideration paid or unless possession was taken of the property supposedly sold with the intention to take it under this sale.

In the second place, the plaintiffs here have pleaded an oral agreement on or about the 24th day of March of 1948 by the terms of which they claimed that they sold the equipment in question to the defendant on that date for the price of \$25,000.

Now, on the state of the record as it now stands, giving the plaintiffs the strongest inference that can be drawn from their evidence, there was no contract entered into on or about the 24th day of March or at any other time until an oral agreement was reached in July or late June of 1948, which agreement was later reduced to writing, at least in part.

The writing was signed by the parties. The consideration was \$10,000 not \$25,000, and, apparently for some reason, that agreement likewise was not ever consummated and in any event the plaintiffs have not sued here upon that agreement. They have sued specifically on oral agreement entered into between certain parties on the 24th of March or thereabouts.

Now, there isn't a shred of evidence of any kind

to show an oral agreement entered into at any time on or about the 24th of March. The most that can be said from the evidence as we have it is that Mr. Agostino made an offer to sell certain property somewhere in the neighborhood of the 20th of March of 1948; that that offer was communicated to Mr. Morgan and that Mr. Morgan says "I will be up to see if I can settle this matter." That is the best face you can put on the plaintiffs' evidence.

On the 10th of April following the communication of that offer, Mr. Morgan did come up and at that time he specifically rejected the offer as made, said it was too high, that he would not deal on those terms. He offered at that time a counter proposition which Mr. Agostino refused and no contract was reached, no agreement was reached between the parties at all on the best face you can put on the plaintiffs' evidence.

Now, the plaintiffs here have also sued on some sort of a goods-sold-and-delivered proposition in their cause of action No. 3, and there has been considerable evidence introduced here to try to show that Columbia Lumber Company used the plaintiffs' equipment and that therefore they must be stuck for the reasonable [184] value of that equipment. I suppose that is the theory we are working under here since there certainly was not any consummated—the minds of the parties never met at any time upon an agreement as to a price.

Now, so far as that goes, your Honor, the only evidence here is that Columbia Lumber never at

any time took possession of any of the equipment in question.

There is some evidence at this time that Mr. Lambert, an independent contractor, did use certain roads which Mr. Agostino says belonged to him. And there is some evidence that the independent contractor, Mr. Lambert, did use a certain pond which Mr. Agostino says was his pond. Now, your Honor, of course, knows what the law is and unless I am mistaken the law is that all parties in common have the right to use titles and that no one party can put a boom across tideland and say "This is mine; everybody else has got to stay out" but that is what the plaintiff is trying to do here and that is the real basis for his claim.

He has tried, he has pounded away here and there with various witnesses but he hasn't been able to show at all that Mr. Lambert used anything that he calls "his" except these ponds and these roads.

The roads were on Public Domain. They, as your Honor, can see from the plat, are not on any claim of Mr. Agostino's that he had any right to claim as exclusive possession. They are [185] not within the limits of his timber claims. His timber claims were off to the left somewhere.

The best that can be said is that Mr. Agostino squatted on public ground for the purpose of logging public ground, and that another contractor getting out logs for Columbia Lumber used roads crossing that ground and used a tidewater pond in getting out logs under an independent contract he has with Columbia Lumber.

Now, certainly, as Mr. Agostino said, as seems to be the evidence here, you can't come on—you can't go into this ground that you have under lease from the Government without my permission or without buying me out. The most charitable thing that we can say is that Mr. Agostino was mistaken as to his rights. Certainly the law would have allowed them to use the tidelands to get to their property whether Agostino wanted to or not, and if there was a boom across there, there isn't any evidence that there was, but if there had been any boom across the mouth of the creek so that they couldn't get in, they would be entitled to move the boom so that they could get in.

It might be questionable as to whether they would have the right to use the roads across the ground that Agostino had pre-empted in order to get access to the lands farther up the creek, I don't know, but at any rate if the roads were used they were used by Mr. Lambert in his independent contract. [186] Because, apparently in hauling the houses and the equipment up to the Columbia Lumber Company—the so-called Columbia Lumber Company—actually it was actually a Lambert camp, in hauling the buildings up to that site they went up the creek and unloaded up there at the pond which, I say, they had a perfect right to do.

It appears to me that there is a complete failure of proof on the part of the plaintiffs either to show any oral agreement at all—on the contrary, they have shown there wasn't any oral agreement. They

haven't showed any quota of merit or goods having been sold and goods delivered as between Columbia Lumber and Mr. Agostino and they haven't pleaded the contract which actually was later signed. Had they done so we would have had some defenses to that contract, but this suit isn't about that contract at all apparently.

Thank you, your Honor. [187]

* * *

The Court: The first cause of action of the plaintiffs' amended complaint in this action is based upon an alleged contract of purchase and sale and is, as I understand it, it is pleaded under the statute.

The third cause of action, which is the only one remaining other than the first since the second was ordered stricken, is based upon, as I understand it, the common law pleading of *indebitatus*, that is, being indebted he assumed or promised to pay. But in the third cause of action a number of the paragraphs in the first cause of action are adopted by reference and therefore the third cause of action and the first cause of action, as I concede them to be, are not widely different and in some aspects identical.

There is, as I understand the amended complaint, at this time no cause of action which is analogous to the common law plea of *quantum meruit* or *quantum valebat*. *Quantum meruit*, I suppose, being roughly translated "as much as he deserved" and *quantum valebat* "as much as they were worth." The latter is the one that is ordinarily used or the

form of it is ordinarily used where the pleading is for a sale for the reasonable value thereof where there is no specific expressed agreement as to the purchase price.

I have examined the pleadings particularly to see if either the first or the third cause of action could be construed as a cause of action based upon the reasonable price of the property sold and delivered, if any was sold and delivered. In my judgment, although it is a serious thing to interfere with the putting of a case to the jury, upon any cause of action there is not sufficient evidence to warrant putting the case to the jury [203] upon the first cause of action as an agreed contract of purchase and sale for the agreed price of \$25,000.

As has been pointed out, neither Mr. Lambert nor Mr. Rowell is authorized to make any contract upon the responsibility of either on behalf of the Columbia Lumber Company. The most that they could do would be to carry messages from Mr. Agostino to the Columbia Lumber Company office and bring a message back, and that is precisely what they did.

- The testimony of Mr. Agostino and Mr. Lambert is not entirely harmonious but in most respect it is substantially so and out of it all I am convinced that there is enough to go to the jury on a contract of purchase and sale for a reasonable price. It would be analogous to my going into a grocery store and buying a sack of flour and taking it away without saying anything about the price. I would be liable for the reasonable price.

In this case there was a discussion into the price but the parties evidently didn't agree upon the price, but the Columbia Lumber Company did agree to take over the property and accepted possession of it and in that respect I am convinced that Mr. Lambert was their agent and having accepted possession of the property they are bound to pay the reasonable value thereof.

Not only was Mr. Lambert their agent but this whole scheme was confirmed by Mr. Morgan when he came to the property on [204] the 10th of April. He didn't then reject anything except the price of \$25,000. He didn't tell his people to go away and not bother Mr. Agostino any more. He was quite willing to take everything that Agostino could give and take his chances on payment of it later in some fashion; get it as cheap as he can, which, I suppose, is legitimate business. But he cannot be permitted to get all the benefits that Agostino could give him and then walk away saying "I am not bound to pay anything" and "You will have to look to some independant contractor or to the man in the moon for your pay" and "It isn't worth anything." In my judgment, before the thing can go to the jury there must be an amended pleading that will set out the date that an agreement was entered into—the plaintiffs sold and delivered to the defendant and the defendant accepted certain property including the timber permit and other things of the reasonable value of whatever the plaintiffs claim the

reasonable value is and then the matter will be up to the jury to fix the reasonable value.

That is my view of the case at present and counsel may have until tomorrow morning to file an amended pleading in which they can keep their present two causes of action, if they wish to, but there must be a cause of action based upon a sale and delivery for reasonable value.

Then, by appropriate instructions the jury will be asked to find the reasonable value of the property delivered to the [205] defendant, if any was delivered.

The motion for an instructed verdict is denied and the jury may be recalled.

Mr. Davis: Before the jury is recalled, your Honor, did you say that the first cause of action was not to go to the jury?

The Court: The first cause of action, as I conceive it to be, cannot go to the jury.

Mr. Davis: Then in the event an amended complaint is filed, it should not include the first cause of action?

The Court: That is—my view is that the amended complaint should not include the first cause of action.

Mr. Bell: Your Honor, may we do that by supplemental complaint or should there be filed an amended complaint?

The Court: It can be done by a supplemental complaint but in that event the supplemental complaint alone will go to the jury.

The answer interposed may be considered an answer to the supplemental complaint if counsel so desire.

Mr. Davis: If we desire to file an answer we may have it to file?

The Court: Yes, the amended answer now on file can be considered as an answer to the supplemental complaint, if counsel wish. However, there will be some difference in paragraphing and so on so perhaps after the supplemental answer is filed counsel [206] will desire to file an answer and time will be afforded for that.

Mr. Davis: I asked the Court as to whether under his ruling—. While I am at it, your Honor, I think the same thing is true as to the third cause of action as it now stands?

The Court: As the third cause of action now stands I think it ought not to go to the jury because it incorporates the provisions of the first cause of action with respect to the contract of purchase and sale for the specific sum of \$25,000. The third cause of action is one, as I pointed out, of _____, assumes that being indebted they promise to pay. The third cause of action by amendment could stand but as it is now stated it ought not to go to the jury and I think I shall not permit it to go to the jury.

Mr. Davis: We can have the usual exceptions to the Court's rulings?

The Court: Exceptions will be noted.

Jury may be recalled.

The record will show all members of the jury present. Defendant may call a witness.

Mr. Boochever: Mr. Jacobsen.

E. M. JACOBSEN

called as a witness herein, being duly sworn, testified as follows: [207]

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. E. M. Jacobsen.

Q. What is your occupation?

A. I am Supervisor for the Forest Service.

Q. Have you been subpoenaed to appear as a witness here? A. I have.

Q. Who subpoenaed you?

A. The plaintiff.

Q. Now, Mr. Jacobsen, are you the Supervisor of the area where Barry Arm is located?

A. Yes, I am.

Q. Are you familiar with who have been granted timber rights in that area? A. Yes.

Q. Has the Columbia Lumber Company or was the Columbia Lumber Company granted an extensive timber right there early in 1948?

A. What do you mean "extended?"

Q. Extensive—a large timber right?

A. Yes.

Q. Did they have the right to go in there to cut that timber?

(Testimony of E. M. Jacobsen.)

Mr. Bell: I object to that as a conclusion of the witness.

The Court: Overruled. [208]

Q. (By Mr. Boochever): They did have the right, you say, to go in there and cut that timber?

Mr. Bell: I object to that as leading and suggestive.

The Court: Read the question.

(Question read.)

The Witness: Yes.

Mr. Bell: Wait a minute. I object and ask that his answer be stricken. Your Honor has asked that it be read and now he has answered the question and I move that the answer be stricken.

The Court: The objection is overruled and the motion is denied.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Mr. Jacobsen, do you know whether Mr. Agostino and Mr. Socha had timber rights in there?

Mr. Bell: I object to that for the same reason—because that would be a conclusion of whether they had rights in there. He would be passing on the laws of the land and it would be equal to Russia.

The Court: No, he can tell what he knows of the facts as far as his office is concerned or his department is concerned.

Q. (By Mr. Boochever): What is a timber right, Mr. Jacobsen?

(Testimony of E. M. Jacobsen.)

The Court: I think a "right" is the wrong permit; isn't [209] it "permits"?

The Witness: It doesn't make much difference whether we call it a right. They are granted a privilege to cut the timber on the lands.

Q. (By Mr. Boochever): Who owns the title to that land? A. The Government.

Q. The United States Forest Service acting for the Government grants various people permission to cut timber on that? A. Yes, sir.

Q. Mr. Jacobsen, you say the Columbia Lumber Company did have a permit to go in there and cut timber in 1948? A. They did have.

Q. In Barry Arm area? A. Yes.

Q. I will show you a map which was drawn by Mr. Agostino and is marked Plaintiffs' Exhibit for Identification No. 2, and it purports to represent Mr. Agostino's camp at Barry Arm and some other property there, and ask you to look at this map and see if you can tell what it is about there first and orient yourself with it?

A. I have seen a lot of maps and I never seen one without an arrow showing directions before, so I can't orient myself too well with it.

The Court: Do the jurors hear the witness?

The Witness: I believe that this is supposed to be Mosquito [210] Creek. It is labeled Mosquito Creek running through here. I think it is oriented this way—the way it lies before me, which is fine.

Q. (By Mr. Boochever): Now, according to

(Testimony of E. M. Jacobsen.)

that map there are some blocks marked out here as being Agostino's timber that he had the right from the Forest Service to cut, would you say whether or not that is approximately where his timber permit began the right to cut?

A. Yes, it is not correct by any means but it is an idea.

Q. Approximately where was the area that Columbia Lumber had the right to cut?

A. Well, that is beyond up anywhere else but this area.

Q. In other words, just about all the other timber in that area? A. Correct.

Q. Before Columbia Lumber had that right was that advertised for sale by the Forest Service for bids?

A. Advertised 31 days according to law.

Q. And anyone could bid on that—could have bid on that if he desired? A. Yes.

Q. But Columbia Lumber Company was awarded that contract, is that correct? A. Right. [211]

Q. Permit, I believe, would be the correct word?

The Court: What is the technical name, do you call it a—

The Witness: It is a contract. It is a permit if it is a less amount than 100 dollars and it is a sales agreement in an amount of 100 to 500 and it becomes an advertised contract over 500 dollars stumpage value.

The Court: Anything further?

(Testimony of E. M. Jacobsen.)

Q. (By Mr. Boochever): Do you know whether Mr. Agostino's timber there that he had the permit to cut has been cut now?

A. It is not completed.

Q. There is still some of that that has never been cut? A. It is still pending.

Q. That means it has never been cut to your knowledge to date, is that right? A. Yes.

Mr. Boochever: That is all, Your Honor.

Cross-Examination

By Mr. Bell:

Q. You have known Agostino for quite a number of years, haven't you? A. I have.

Q. He has been cutting timber at that place since 1944, hasn't he?

A. I think that is correct. [212]

Q. Or '45, possibly?

A. '44—'43, the sale was first made, yes, '44.

Q. And he cut in 1945, '46 and '47, didn't he?

A. Yes, sir.

Q. I hand you a paper that has been identified as Defendant's Identification A. I will ask you to state whose signature that is at the bottom of that instrument? A. That is my signature.

The Court: I think that has been admitted, Mr. Bell.

Mr. Bell: It has been, Your Honor.

The Court: It is Defendant's Exhibit A.

Mr. Bell: It is. I apologize. It says "Identifi-

(Testimony of E. M. Jacobsen.)

ation" and then it says "Exhibit". That is my mistake.

Q. That is your signature on that?

A. Yes.

Q. That is what is termed a right to cut timber, isn't it?

A. No, that is a modification of the original timber sale.

Q. It is an extension of timber sales?

A. Yes.

Q. Now, then, that extends this—you intended by this, then, as I understand it, all timbers shall be cut and removed on or before and none later than December 31, 1948?

A. That is correct.

Q. And he had a perfect right to cut timber until December 31, 1948, didn't he? [213]

A. Yes, sir.

Q. Now, then, you are familiar with the location there at the mouth of Mosquito Creek, aren't you?

A. I am.

Q. Can you get your big boat in there only at high tide?

A. Well, I wouldn't want to navigate that creek at any time.

Q. Did you ever take your big boat in?

A. Never.

Q. How do you go in?

A. Go in by small skiff.

Q. You tie your big boat outside?

A. Yes.

(Testimony of E. M. Jacobsen.)

Q. Is that the only available way of getting in to the timber that lies above and beyond the mouth of Mosquito Creek?

A. Yes, that is the only available way to get in.

Q. And Agostino and Mr. Socha had been operating at that place for several—three or four years, haven't they? A. Yes.

Q. You have seen their camp there, haven't you?

A. Yes.

Q. It was a nice camp, wasn't it?

A. Very fine camp.

Q. I will ask you to look at this letter and state, if you know, what it is. I will have it marked Plaintiffs' Exhibit Identification No. 37. Do you recognize that letter? [214] A. Yes.

Q. Who wrote the letter? A. I did.

Q. And that was mailed to those people or delivered personally to Herman H. Ross, was it not?

A. Yes.

Q. And that letter speaks the truth, doesn't it, it does as far as it could be? A. Yes.

Mr. Bell: I now offer it in evidence.

Mr. Boochever: Your Honor, I object to it as irrelevant and immaterial. I don't think there is any relevancy to that letter.

The Court: I will be glad to hear from counsel but at the present moment I do not see the relevency of it.

Mr. Bell: Very well, please allow me an objection.

(Testimony of E. M. Jacobsen.)

The Court: Objection is sustained but it may be filed to become a part of the record. Has it been marked for identification?

Mr. Bell: Yes, sir, Plaintiffs' Exhibit Identification No. 37.

The Court: It may be filed.

Q. (By Mr. Bell): Do you know who has had possession of the premises at the mouth of Mosquito Creek since March or April of 1948? [215]

A. No. No, not to be sure.

Q. Have you been in there several times?

A. I have been in there twice this year.

Q. Were you in there quite a number of times last year? A. Once only, I believe.

Q. And what was the occasion for your going in then?

A. When—last year or this year?

A. Last year?

A. Last year I made an inspection of the areas.

Q. Did you go on the ground at the old Barry Arm Camp?

A. No, I don't believe I did. I went up the creek up the river with a small boat.

Q. And how far up the river can you go with a small boat?

A. Depending on the state of the tide.

Q. Well, how far did you go that time?

A. With the high tide you can go up to the Columbia Lumber camp which is on way up the

(Testimony of E. M. Jacobsen.)

creek, I would say a half to three-quarters of a mile up from the mouth of the creek.

Q. Half to three-quarters of a mile from the mouth of the creek? A. Yes.

Q. Have you been around the house of Bruno Agostino or Mr. Socha and Mr. Agostino this year?

A. I have.

Q. Who is in that place now? [216]

A. The Columbia Lumber Company watchman was there when I last visited. Yes, that is right.

Q. And when was that?

A. I wish I could recall the date.

Q. Well, the approximate date?

A. I came very unprepared because I didn't know what was going to be asked of me.

Q. Approximately?

A. A month or so ago.

Q. It would be possibly March or April of this year that the Columbia Lumber Company watchman was there, is that right?

A. I would say the first part of May.

Q. Of May? A. Yes.

Q. Do you know who this watchman is?

A. It is Mr. Hooper—Mr. and Mrs. Hooper.

Q. And do you know where the sawmill is now? Did you see the sawmill that Mr. Agostino and Mr. Socha had in there? Did you see that this trip in?

A. Yes, I did.

Q. Where is that?

A. That is on a point of land about 600 to 800 feet away from the camp—from Bruno's camp.

(Testimony of E. M. Jacobsen.)

Q. And this watchman that you are speaking of, did you talk with him? [217] A. I did.

Q. And is he still an employee of the Columbia Lumber Company? A. He is.

Q. Do you know how much timber the Columbia Lumber Company took out of there?

Mr. Davis: Your Honor, I think that is purely irrelevant.

The Court: I think it may have some bearing; at any rate, the objection is overruled. It may be admitted.

The Witness: Less than two million felled and taken out. I cannot give you it exact.

Q. (By Mr. Bell): Wasn't it—to refresh your memory—wasn't it around three million feet?

A. Beg your pardon?

A. Wasn't it three million feet that they took out?

A. No, I don't think it was that much taken out.

Q. They are not cutting there, are they?

A. They are cutting there now.

Q. They are still cutting?

A. They are still cutting.

Q. And are they still using Mosquito Creek for their inlet and outlet? A. Yes, sir.

Q. Do they use the same logging pond?

A. The same as what? [218]

Q. The logging pond or the pond that was used by Agostino and Mr. Socha?

A. No, they used the mouth of the creek.

(Testimony of E. M. Jacobsen.)

Q. They have got a place down at the mouth of the creek that they stop the whole creek up, you mean?

A. Well, the water runs freely underneath the logs, if that is what you mean.

Q. Do their logs go down below the pond that was made by Agostino and Mr. Socha and go on down below, do they? A. Yes.

Q. They are using all of the creek now?

A. I think I am safe in saying that, yes.

Q. And how far up the creek have they cut the timber?

A. Mile and one-half—mile and one-quarter.

Q. How far up the creek do they have the right to cut the timber?

A. I believe it is very close to three miles.

Q. And you stated that Agostino's timber was not quite all cut, what do you mean by that?

A. May I answer that question in my own way?

Q. Sure, you just tell us.

A. The first sale was made to Mr. Agostino or, rather, to M. A. Jacobs, and it was in the amount of \$500 stumpage value, which is a half-million feet. It was not marked except by natural [219] boundaries. It was from a point of land to an old cut-over area. The next sale was around the point and up to a little lagoon or inlet and I think that is what you had reference to a little while ago which was called their booming grounds. Does that explain it?

Q. Is there piling driven in there—piling set in?

(Testimony of E. M. Jacobsen.)

A. Yes, hand-set piling in there.

Q. And that is where they boomed their logs?

A. That is where Mr. Agostino and his associate boomed their logs, yes.

Q. Now, they had another 250,000 feet to cut according to that statement that you signed there. That gave an extension until December 31, 1948 to cut?

A. Yes.

Q. Now, did the Columbia Lumber Company then when they came in and took over, did they cut or are they the only people that have cut—ever cut any logs in there since?

A. Yes, they are the only people.

Q. And whatever part of the area that was allowed to Mr. Socha and Mr. Agostino, if any logs have been cut it has been cut by the Columbia Lumber Company?

A. Definitely, yes.

Q. And has it pretty well been cut over—the whole area up for a mile and one-half?

Mr. Davis: I object to that last—the mile and one-half [220] has nothing to do with the Agostino and Socha——

Mr. Bell: He is confusing the issue.

Q. Has the area for a mile or mile and one-half up the creek above the Socha camp been pretty well cut over?

A. No.

Q. There are some logs in there yet?

A. I don't expect they will finish this year.

Q. Are they cutting in there now?

A. They are working in there, yes.

(Testimony of E. M. Jacobsen.)

The Court: I think we had better suspend until tomorrow morning. The trial will be continued until tomorrow morning at 10 o'clock and in the meantime I am obliged to charge you again that you ought not to discuss the case among yourselves or with others or listen to any conversation about it and not form or express an opinion until it is finally submitted to you. Court now stands adjourned until 10 o'clock tomorrow morning.

(Whereupon, at 5:00 p.m., Wednesday, June 1, 1949, the hearing was adjourned until 10:00 a.m. the following day.)

Thursday, June 2, 1949

(Whereupon, at 10:00 a.m., the above-entitled matter came on for taking of testimony.)

The Court: Roll may be called of the regular jury.

(Names of members of the jury were called and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Mr. Jacobsen may resume the witness stand. Counsel may inquire.

Mr. Davis: If the Court please, I have some requests that I would like to make to the Court and I think probably should be made outside the hearing of the jury.

The Court: Jury may retire to the jury room until recalled.

Mr. Davis: If the Court please, at 10 o'clock—

about two minutes ago—we were served with a proposed amended complaint in this case. We have read it hurriedly but, of course, not thoroughly. During the night and in view of the Court's ruling yesterday we have attempted to draw an answer to the proposed second amended complaint, of course shooting in the dark as we didn't know exactly what was going to be in it. We found we ran into all kinds of difficulty in trying to make that pleadings, and, as we see the pleadings, we have here, it is apparent we are going to have to make motions to strike—other motions against the complaint as filed, and it is apparent that we are going to have to proceed on an entirely different theory from what we proceeded on in the case up to now. Accordingly, in view of the Court's ruling on the motions I made yesterday and the complaint which we now have, at this time I would like to [224] move the Court for entry of a non-suit against the plaintiffs in this case without prejudice in the plaintiffs if they care to do so to commence an action on this theory that they are now proceeding under or such other theory as they may see fit. The reason for that is, as will be apparent from a reading of the pleadings, the new complaint is on an entirely different theory from anything to which we previously proceeded or which we previously pleaded. It is a different theory from what we were following at the time we cross-examined witnesses who had previously been heard. It is on the theory which will

require us to secure evidence which we do not have here at this time, which we could not have expected to be required to meet under the pleadings and the state of the record as it was at the start of the trial and evidence which will take us a little while to get together.

It seems to me the proper way now in view of the ruling of the Court is that this trial be declared a non-suit and let the plaintiffs file a complaint, if they care to do so, and let us then make our pleadings in the usual course and then go to trial on that theory. I feel that we would be damaged beyond repair to try to go ahead with this trial on the new theory. I don't see how we possibly can be called upon to meet the theory here presented. I would like at this time to make that motion.

The Court: The motion will be denied for the reason that [225] counsel had every right to anticipate that that might be the ruling of the Court and, in fact, in counsel's argument yesterday I recall he explicitly stated that he thought that the third cause of action, as stated in the plaintiff's amended complaint, was based upon the theory of reasonable value. I disagreed with counsel then and I do now. But now that an amended complaint has been filed based upon reasonable value and in no other way departing from the original complaint I believe it would be a denial of justice to dismiss it and compel the plaintiffs to start all over. In fact, our modern theory of pleadings is all against it and that would have been necessary 200 years ago but it isn't necessary now and the motion is denied.

Mr. Davis: Your Honor, I may have said yesterday I thought the third cause of action was an action for reasonable value. If I so said I mis-stated. I didn't think it was a cause for reasonable value; I thought it was an action for goods sold and delivered. I thought that was what I said. At any rate there wasn't anything in that cause of action at all which had anything to do with reasonable value.

The whole theory of the case was that there was a set contract at \$25,000. Now, we come to Court anticipating that we would be able to show that there wasn't any oral contract made on or about March 24th for \$25,000, and I think—and the Court has so ruled—that we have shown that there wasn't any [226] such contract and it appears to me at this time to require us to go ahead on an entirely different theory of reasonable value is asking more of us than we should be required to bear. Now, if the Court's ruling is to stand, and as I suppose it will, then I would ask that this matter be continued to allow us time to plead to this complaint and make a motion, if we see that motions are necessary to the complaint, and to get in a proper answer to that complaint and to allow the plaintiffs then to file reply, if they care to do so.

Now, I agree with the Court that we are not acting under the old strict rules of common law pleadings where if a person sued for goods sold and delivered and it turned out that what he was actually suing for was money—That was thrown out of Court. I agree, we are not operating under those rules. But

the whole function of proceedings is to notify the parties as to what is to be required on a suit and to boil down the issues so we don't go here and there in the Court room in all directions, so that we will have some idea what theory we are following, and I believe it is absolutely improper to allow the plaintiff at this stage to change his theory entirely as he has done and require us to meet that theory in the middle of the trial.

The Court: The plaintiff is simply filing a complaint to meet the testimony given. The Court requires it, otherwise some other disposition would have had to be made of the action. I [227] don't believe the defendant is being put under any burden at all. The defendant had every right to face whatever issue might arise legally out of the facts of the case.

How much time does counsel require to file motions and other things?

Mr. Davis: Your Honor, I think if we may have until this afternoon at two o'clock we may by that time have our motions and a proposed answer to this complaint.

The Court: That request will be granted and the jury will be recalled.

Mr. Davis: The record, of course, Your Honor, will show the usual exceptions to the ruling?

The Court: Yes, but counsel in order to protect his record may take all the exceptions that he deems are necessary. Record will show that the defendant excepts to all the rulings of the Court.

Record will show without objection that all members of the jury are present.

Ladies and Gentlemen of the Jury, yesterday in your absence arguments were had upon questions of law with which you have no concern now, and as a result of a decision made by the Court after hearing arguments upon the questions of law then presented the plaintiffs have filed a second amended complaint in this action. The defendant requires time to make adequate and proper response to the second amended complaint and for that reason [228] the trial of the case will be suspended until 2 o'clock this afternoon. Please report again at 2 o'clock this afternoon, and you may now be excused until that hour. In the meantime, remember your duty not to discuss the case among yourselves or with others and not to listen to any conversations about it and not to form or express an opinion until it is finally submitted to you. That is all, you may now retire.

(Whereupon, at 10:30 a.m., Thursday, June 2, 1949, the hearing was adjourned until 2:00 p.m. the same day.)

Afternoon Session

The Court: Roll of the jury may be called.

(Names of the members of the jury were called and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Is counsel ready to proceed?

Mr. Bell: We are ready.

Mr. Boochever: Your Honor, in accordance with your instructions we now file motions against the amended pleadings which are before the Court.

The Court: Do counsel wish to argue?

Mr. Davis: I think, Your Honor, at least they should be considered outside the presence of the jury.

The Court: Jury may retire to the jury room until recalled.

Mr. Boochever: Your Honor, this motion is three different points to it.

First point, with regard to paragraph 6, there is an allegation that paragraph 6 of the amended complaint states as follows: “* * * That by reason thereof, the defendant is justly indebted to the plaintiffs in the sum of \$37,412.00 but plaintiffs seek to recover only the sum of \$25,000.00; * * *”. The reference there \$37,412.00 is irrelevant and immaterial since they are suing for \$25,000 and we move that it be stricken for that reason.

In regard to paragraph 5 of the complaint, there is [230] reference made to selling the property to the defendant and giving the property to the defendant at its request possession of all of the above-described property. It alleges that this occurred on or about the 24th day of March, 1948. We feel we are entitled to know to whom of the defendant corporation it is claimed that this property was sold, to whom it was given, the name of the individual, and what authority that such individual claimed to have to represent the defendant Com-

pany in that matter, and we feel we should know in that regard who they are relying on in sitting up that cause of action.

Then in regard to paragraph 6 we make a similar motion in regard to the demand that is alleged to have been made on the defendant for the payment. We want to know on whom that demand was made, by whom and at what date and what place that demand was made and what capacity the person on whom it was made alleges he represented the defendant company.

Those are the motions which we made in regard to this pleading, Your Honor.

The Court: As to the first paragraph of the motion, paragraph No. I, the motion is denied. The averment of \$37,412 may be unnecessary but it seems to me that from the reading of the complaint that it is not improper to state that sum if that is the plaintiffs' view of it.

As to the second and third paragraphs, they are likewise denied because all of that information has now been fully [231] developed by the examination and cross-examination of plaintiffs' witnesses and there is nothing that could be added to the information of the defendant if the requests were complied with. Moreover in the—similar motion was directed to one of the plaintiffs' pleadings in this case and names were furnished, so that in further delaying the case in requiring the plaintiffs to grant this motion there would be a denial of justice, and the information is now in, in my judgment, just as

fully within the knowledge of the defendant and its counsel as it would possibly be by any further pleading.

Mr. Davis: Now, Your Honor, I would like to renew the motion that I made yesterday—a motion for directed verdict and the motion I made this morning for a non-suit insofar as the second amended complaint is concerned, for the reason that on plaintiffs' case there is not sufficient to allow the matter to go to the jury on any claim sale made on the 24th day of March, 1948. It is apparent from the evidence we now have that there wasn't any such sale on that date or about that date.

The Court: The motion is denied—the motions are denied and exceptions will be noted as of course.

Mr. Davis: At this time, then, Your Honor, we have prepared an answer and a counter-claim to the second amended complaint. I would like to file the original and serve a copy on counsel.

The Court: Has counsel for plaintiffs read this pleading? [232]

Mr. Bell: We are just reading it, Your Honor, carefully.

The Court: You may proceed.

Mr. Bell: Your Honor, I object to the filing of the cross complaint at this time because at this particular stage of the trial because if there was such a defense they had it all the way through. That is the only reason. Everything they set forth on the cross-complaint they can make proof under the answer anyway and that would require us to take

an hour or two to plead to it to get our answer to the cross complaint and reply to the answer. It will take an hour or more to do it, and they can make any proof contented for under the answer anyway.

The Court: I think the cross complaint must stand and I do not know of any reason why we cannot proceed with the trial. Each party knows what the other party's contention is now. We can proceed and take testimony and the time will be extended to file an answer until tomorrow morning.

Mr. Bell: That will be fine; that will be all right, Judge, we can do it.

The Court: A reply to the affirmative matter contained in the answer, including the cross complaint.

Mr. Bell: All right, that will be all right.

The Court: All right, the order will be then that the plaintiffs have until 10 o'clock tomorrow morning to file a reply. [233]

Mr. Boochever: Your Honor, when we left off with the trial of the case, Mr. Jacobsen was on the stand under cross examination. That was prior to the filing of the second amended complaint and our answer in cross complaint and when we get to re-direct examination I would like to have more liberty than normal and be able to go into some matters that weren't covered on original direct examination for that reason.

The Court: Mr. Jacobsen was sworn as a witness for the defendant?

Mr. Boochever: Yes, that is right.

The Court: You may bring in new matter if you desire.

Mr. Boochever: Thank you, Your Honor.

The Court: Jury will be recalled.

Mr. Bell: Your Honor, wouldn't we be permitted to reopen our case just for a few questions as to values there that we didn't cover. In checking with the evidence, there is two or three things that I forgot to ask about the values of.

The Court: Very well, you may do so. We had better finish up with Mr. Jacobsen first.

Mr. Davis: Your Honor, I think I would like at this time to make an objection to the plaintiffs' reopening his case for that purpose and let the record show that.

The Court: The objection is overruled and an exception will be noted as of course.

Mr. Jacobsen will be recalled. [234]

The Record will show all members of the jury present.

As I recall it, plaintiff was continuing the cross examination when we left off.

Mr. Bell: No, I rested my cross examination.

The Court: Redirect examination.

E. M. JACOBSEN

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

(Testimony of E. M. Jacobsen.)

Redirect Examination

By Mr. Boochever:

Q. Mr. Jacobsen, I believe when you left the stand last night you mentioned that you had been out at Barry Arm in the spring of this year and that Mr. Hooper was at the Agostino and Socha camp, is that correct?

A. I don't quite hear you?

Q. I believe when you got through with your testimony yesterday you stated that you went out to the Barry Arm Camp sometime this spring, is that right?

A. Correct.

Q. And I believe you stated that Mr. Hooper was present there, is that correct?

A. That is correct.

Q. Do you know whether he was present there by permission of Mr. Agostino?

Mr. Bell: Object to that unless he knows. [235]

The Court: That is the very question asked.

Mr. Bell: Just answer yes or no.

A. I do know.

Q. (By Mr. Boochever): Was he there by permission of Mr. Agostino?

Mr. Bell: I object to that because how would he know. First let him qualify.

The Court: Overruled.

Mr. Bell: Exception.

A. I knew there was a case either pending or coming up so I wondered why he should be on the

(Testimony of E. M. Jacobsen.)

Agostino premises where he was and I asked him point blank. That is, I asked Mr. Hooper.

Mr. Bell: Now, your Honor, it is apparent he is going to make a statement about what someone down there, an employee of the Columbia Lumber Company, told him and we object to it.

The Court: Mr. Jacobsen, you are not permitted to say what Mr. Hooper told you. That is known in law as "hearsay," for good or bad reason it is barred.

Q. (By Mr. Boochever): Was Mr. Hooper there by permission of Mr. Agostino?

Mr. Bell: I object to that.

The Court: You can answer that only from your own knowledge, not from what Mr. Hooper told you?

A. I can't answer then.

Mr. Boochever: Your Honor, I believe that plaintiffs' counsel went into Mr. Hooper being there on examination of this [236] witness on cross-examination. I think we are entitled to go into it, not to prove the truth of anything that Mr. Hooper said but just to show the words that he said explaining his presence.

The Court: That is hearsay by all the rules I know and I don't know how it can be admitted. Maybe it should be but generally speaking hearsay isn't admitted and this is no special rule. Yesterday I am quite certain no objection was made to anything in the cross-examination that brought out any

(Testimony of E. M. Jacobsen.)

answer given by this witness. Objection is now made to the testimony of the witness upon the ground that he is about to give hearsay something that Hooper told him. That is barred by the rules of evidence.

Mr. Boochever: Further, your Honor, if I may add one other point, they have alleged that Hooper was an employee of the Columbia Lumber Company, the defendant in this suit. Therefore, he is speaking, we assume that, in that regard from what he said, he is speaking for the defendant.

The Court: It doesn't change the rule of law, Mr. Boochever. The rule of law is that to have one witness repeat what another said is hearsay.

Q. (By Mr. Boochever): Mr. Jacobsen, yesterday you were shown a map allegedly drawn by Mr. Agostino, was that map at all an accurate portrayal of the Barry Arm Camp area? [237]

A. No, it was very misleading.

Q. I show you here a map and ask you if you can identify what that is?

A. This is a regular map of the Chugach National Forest.

Q. Who puts that map out?

A. Government Printing Office.

Q. Is that an accurate portrayal of the area of Prince William Sound and the Barry Arm Camp area? A. The most accurate available.

Mr. Boochever: I would like to have this marked as Identification No. E.

(Testimony of E. M. Jacobsen.)

The Court: It may be so marked. If that is an official map I can see no objection to its going in.

Mr. Bell: We have no objection.

The Court: It may be admitted in evidence and marked Defendant's Exhibit E.

Mr. Boochever: I think, rather than have it mounted, I will have the witness draw on the blackboard a portrayal, if he will.

The Court: I am sorry, Mr. Boochever, because the blackboard diagrams can never go to the upper Court. You may get a plain piece of paper.

Mr. Boochever: Possibly he could draw on the reverse side of this map and show it in enlarged scale.

The Court: If you desire that it may be done.

Mr. Boochever: First I wish to put the map as it is now on the blackboard here for a minute to have the witness identify certain areas.

Q. Mr. Jacobsen, I believe if you would come forward, please. Now, would you point out to the jury where Barry Arm is on this map?

A. Right here.

Q. Is that marked by some colored crayon there?

A. Yes, it is colored crayon. It is red pencil and ordinary pencil and ink in three different colors.

Q. Now, this is an indication of a stream running down there, what stream is that?

A. That is Mosquito Creek.

(Testimony of E. M. Jacobsen.)

Q. And where in that property was the Agostino-Socha camp located?

A. On the extreme point here.

Q. Where was the Columbia Lumber camp located?

A. About half a mile up the creek from the Barry Arm camp.

Q. And now I would like you on the reverse side to draw that in in large, covering the whole area here, just the part of the Barry Arm camp there so that the witnesses can see that clearly and show the relation of the Agostino-Socha camp and the Columbia Lumber Camp, if you will, sir?

A. The map will not be very correct because I cannot sketch [239] like that, but I will do my best.

The Court: Make the lines as heavy as you can so that the jury can see.

Q. (By Mr. Boochever): Now, can you label where Mosquito Creek is on that map? Now, if you will stand back a little from the map. Would you show the jury where the Barry Arm camp of Mr. Agostino and Mr. Socha was located in regard to this map?

A. It is located directly on their fir sale in this area here.

Q. And where is the Columbia Lumber Company camp located in that area?

A. This represents one-half a mile up on the opposite side of the creek.

Q. And that is on the opposite side of the creek

(Testimony of E. M. Jacobsen.)

and up above, is that right? A. Correct.

Q. Now, there was testimony about a pond, where is that pond located on the map—pond where Agostino and Socha used to boom their logs?

A. At that indentation in the creek. There is still——.

Q. Where did the Columbia Lumber Company boom its logs and make its rafts?

A. Up to the sawmill here. They took this part here and run up the creek necessarily for two or three hundred feet, I guess. I don't know how far it is. [240]

Q. On the far side of the creek?

A. They take the creek proper.

Q. Right in there? A. Yes.

Q. Was it possible for the two outfits to use the mouth of this creek here in logging operations?

A. It was providing the Columbia Lumber Company went up-creek a little further.

Q. And there was nothing to prevent them from doing that so that the two outfits could use that creek at the same time? A. No, that is right.

Q. Now you say this represents Bruno's first sale. What do you mean by that, sir? I think you can resume your witness chair there, if you wish.

A. By a sale I mean a purchase of a tract of timber.

Q. And this was the first tract of timber purchased, is that right? A. Yes.

Q. Who purchased that tract of timber?

(Testimony of E. M. Jacobsen.)

A. M. A. Jacobs from Anchorage.

Q. M. A. Jacobs, is that right? A. Yes.

Q. Did Mr. Agostino acquire it from Jacobs?

A. No, they were partners but it was in his name.

Q. Had there been other timber which had previously been cut [241] off in that area prior to that purchase?

A. There had been up to the point that we have the remaining blank space.

Q. Down in this neighborhood here?

A. Yes.

Q. That had been cut off before Agostino got in there at all? A. Many years ago.

Q. Someone else had cut timber in that area then? A. Yes.

Q. What is this area in here represent?

A. That is the second sale issued to Barry Arm which is the same partnership.

Q. When about was that issued, Mr. Jacobsen?

A. 1945, mid-summer, I believe.

Q. And when did that expire—that permit to cut timber?

Mr. Bell: I object to that, assuming something that is not in evidence, when did it expire. That is assuming something that is not in evidence. Leading and suggestive.

The Court: Overruled.

Q. (By Mr. Boochever): When did that permit expire if it did expire?

(Testimony of E. M. Jacobsen.)

A. It originally expired in 1947—December 31st, 1947 and was extended to 1948.

Q. When was it extended? On what date approximately? [242]

A. Mid-summer of 1948.

Q. In the mid-summer of 1948? A. Yes.

Q. Around the month of July, sir?

A. I believe so.

Q. And was it extended to Mr. Agostino and Mr. Socha at that time? A. Yes.

Q. It was not extended to Columbia Lumber Company, was it? A. No.

Q. It was extended to them in mid-July of 1948, then? A. Yes.

Q. Now, did they ever cut off all of the timber in that second area?

A. I am unable to answer that because we have not made final inspection of the area.

Q. You have not made a final inspection to check on that recently? A. No.

Q. Now, where was the timber permit that Columbia Lumber Company had, what area did that cover on this map?

A. That covered all the timber in the valley from the Agostino line on up the creek on both sides.

Q. Was there a gap in the merchantable timber between the end of the Agostino line and the commencement of the Columbia [243] Lumber line?

A. There was about a quarter of a mile, as I recall it.

(Testimony of E. M. Jacobsen.)

Q. A quarter of a mile in here where there was no merchantable timber at all and it was about that where the Columbia Lumber started? A. Yes.

Q. Can you draw in on this map the area covered by the Columbia Lumber permit?

A. I haven't room for that extension.

Q. As-much as can be shown on the map?

A. We will have to assume this to be grassy land and no timber.

Q. Could you speak up on that a little louder, Mr. Jacobsen so that the Judge and the jury can hear you? A. I will.

Q. What did you say about this part?

A. This is grass—no timber. This is the timber. Timber is quite patchy there and it is not continuous. It is just patches there and there as you go along. This part here represents grassy land. It is barren from timber. It is the bottom of the valley and each side on the rising hillside is the timber purchased by the Columbia Lumber Company and the timber is not a solid body of timber. It is in, oh, a quarter of a mile, half mile patches, all along up the valley for about two and one-half or three miles, as I recall it. [244]

Mr. Boochever: I think some members of the jury wish to see the other side of the map and if your Honor permits I will take the map down and let them see it at close range.

The Court: Counsel may proceed.

Mr. Boochever: Your Honor, I wish to introduce

(Testimony of E. M. Jacobsen.)

this sketch drawn by the witness into evidence as Defendant's Exhibit F—the reverse side of the map.

The Court: Without objection it will be admitted and marked Defendant's Exhibit F.

Mr. Bell: No objection.

The Court: It is the reverse side of Defendant's Exhibit E.

Q. (By Mr. Boochever): Mr. Jacobsen, now you have been up in that area a number of times, is that correct? A. I have.

Q. To your knowledge has Columbia Lumber Company ever cut any of the timber that was in Bruno's permit?

A. No, I don't know that they have.

Q. Now, Mr. Jacobsen, have you had occasion to see the equipment which the Barry Arm camp of Agostino and Socha, and whoever their other partners were, had there at Barry Arm?

A. Yes.

Q. Do you know in what condition the caterpillar tractors were [245] in the year 1948 or in the end of 1947?

A. I wouldn't be in a qualified position to state one way or the other as to the condition of machinery. I don't know.

Q. Do you know whether any of the caterpillars had ever been in the salt water?

A. Yes, the cat purchased from Elemar Packing Company was submerged once for a week or so.

Q. And it was in salt water for a week or so?

(Testimony of E. M. Jacobsen.)

A. I guess that is right.

Q. When was that approximately, do you know what year?

A. I believe it was 1946, it could be 1945, I don't recall.

Q. Well, it was submerged in salt water for more than a week, is that right? A. Yes.

Q. Now, testimony has been given in regard to the pond there and it has been testified that part of the pond was cleared of stumps by Mr. Agostino and Mr. Socha, did they clear the part where Columbia Lumber Company used their log rafts, to your knowledge?

A. Yes. I don't know. I don't think there were any stumps out in the creek proper. There were debris and what have you in the still water alongside of the creek.

Q. Is that alongside of where the Agostino-Socha camp was, you mean?

A. Yes, that was adjacent to their cutting area.

Q. Did Columbia Lumber Company use that for their timber area in making their log rafts?

A. No, I don't believe they ever did.

Mr. Boochever: No further questions, your Honor.

The Court: Any further cross-examination?

Recross-Examination

By Mr. Bell:

Q. Mr. Jacobsen, you stated this cat was sub-

(Testimony of E. M. Jacobsen.)

merged in 1946 in salt water, where did that take place?

A. In the very still water where it operated their boom or where they rafted their logs.

Q. Did you see that yourself?

A. Oh, yes, definitely.

Q. Were you there at the time it happened?

A. How else could I see it?

Q. I mean when it first went down were you there? A. No.

Q. Do you know how long it stayed there?

A. I was told—that is hearsay.

Q. Don't tell me how long but what—just tell me what you know about it, how long did you see it?

A. I saw it sitting in the mud.

Q. When? A. (No response.)

Q. When, Mr. Jacobsen? [247]

A. You mean year or state—

Q. About what time?

A. It was either '45 or '46, I don't remember exactly.

Q. And what time of the year?

A. Sometime during the summer time.

Q. Well, was it in the spring or fall or hot summer time? A. I wouldn't venture.

Q. You saw it in operation by the plaintiffs in this case, didn't you? A. I did.

Q. And was that after you saw it in the mud or was it before you saw it in the mud?

(Testimony of E. M. Jacobsen.)

A. I saw it in operation by the plaintiffs both before and after it was in the mud.

Q. You saw it in operation for three or four years after it was in the mud, did you, up until 1948?

A. No, the plaintiff did not operate out there during the year 1948 to my knowledge.

Q. Well, you saw the defendants operate it, didn't you? A. No, I did not.

Q. You did see it at their place, I believe you testified yesterday, you saw it?

A. No, I couldn't have because I did not see it.

Q. Oh, I, I see, I misunderstood. You did see it there in 1948 somewhere? [248]

A. No, I don't believe I did. I only made one visit there in 1948 and I don't recall seeing the cat.

Q. What time of the year was it that you visited the mouth of Mosquito Creek in 1948?

A. That was in July, I believe.

Q. Do you know who was in charge of things there at that time? A. Yes, Mr. Lambert.

Q. Mr. Lambert who testified here before?

A. Yes.

Q. Now, did you receive the checks and sign the permits for the Columbia Lumber Company for the timber sales in there?

A. No, that was handled by the regional office in Juneau.

(Testimony of E. M. Jacobsen.)

Q. Do you know what dates those permits were issued or timber sales were issued?

A. They were issued very early in the spring before I returned from Seattle, I will say March or February of 1948.

Q. That was in 1948? A. Yes.

Q. Could you be mistaken and that they were issued on the 12th day of April, 1948?

A. Yes, I could be.

Q. Didn't you ever see them, Mr. Jacobsen?

A. Yes, but I don't remember the dates.

Q. Now, were they all in one sale or were they in a number of sales? [249]

A. They were in two separate sales, the first one was issued for the east side of Mosquito Flat and the second one was issued for the second side.

Q. Is Mosquito Creek straight or is it a crooked stream? A. A very crooked stream.

Q. I see that you have drawn on this map Mosquito Creek to be quite straight?

A. That is very true, because I couldn't put crooks in. They were just major crooks, I didn't know where the crooks went.

Q. As I understand it, this creek is very crooked back and forth across the grassy valley, is it not? A. It is.

Q. And about how wide is it up in here?

A. Are you pointing?

Q. About even with the Columbia Lumber Company camp?

(Testimony of E. M. Jacobsen.)

A. It is about 40 to 60-feet wide up there.

Q. Is it in high tide? Do you mean it is that wide in high tide? A. That is the creek bed.

Q. Now, then, in low tide it is dried up there or almost?

A. It is dry. It is barren from salt water. Salt water does not back up except it is high tide.

Q. So there is a little stream of water running down through all the time, is it? [250]

A. That is right.

Q. About how wide is the little stream of water that runs by the Columbia Lumber Company camp there when the tide is out?

A. I would venture a guess with the ordinary, not with the heavy freshlet or anything like that but the ordinary, running of the stream I would say about six inches deep by ten feet wide.

Q. Ten feet wide and about six inches deep?

A. Yes.

Q. That is clear water, that is not salt water?

A. That is fresh water.

Q. How far down would you say the stream would be approximately that size in low tide, how far down below the Columbia camp would that go?

A. Not very far. It runs down that way for perhaps two or three hundred feet and then she is deeper and wider.

Q. It gets deeper and wider gradually, does it?

A. I believe the salt water is backed in there most of the time.

(Testimony of E. M. Jacobsen.)

Q. Now, then, you can't get up to the Columbia Lumber Company with your boat, their camp now?

A. No.

Q. You take a skiff to go up?

A. That is right.

Q. Now, you can come in near the shore here down in here, [251] can't you?

A. At Barry Arm camp.

Q. Can you come right up to that when high tide is on, can you come right up into there?

A. No.

Q. How far up can you go?

A. I anchor here.

Q. You anchor here and then you use a small boat to go in? A. Yes.

Q. How many sales did you make to Barry Arm crowd at this Mosquito Creek? A. Two.

Q. I believe you stated that—I think I shoed you this yesterday, did I not, Mr. Jacobsen?

A. A modification of the timber sale agreement. That is an extension of the timber sale agreement.

Q. Now, I notice by that it extended all the rights to remove the timber up to 12-31-48, did it not? A. It did.

Q. Now, at the time that was granted, the Columbia Lumber Company was operating there and taking timber, weren't they?

A. Yes, of course.

Q. Do you remember where you were at the

(Testimony of E. M. Jacobsen.)

time Mr. Bruno Agostino signed that statement, do you remember where he signed it?

A. Yes, definitely. [252]

Q. Where was he? A. At Whittier.

Q. At the Columbia Lumber Company place at Whittier? A. Yes.

Q. Now, did you prepare that for him to sign?

A. Yes.

Q. And did you write it yourself or someone there write it? Did you dictate and have someone write it?

A. No, I had it written up months and months before in the home office and I was trying to corral Bruno by mail or any manner I could from the time I arrived in the first of April.

Q. Then at the time he signed this, which was the 10th day of July, 1948, Columbia Lumber Company had already cut many thousands of feet of timber there, hadn't they? A. Yes.

Q. Now, you heard—I will withdraw that—How did you come to have it prepared a long time before, Mr. Jacobsen, before you presented it to Bruno that day?

A. Because I was unable to contact him by mail or otherwise and this was my first opportunity.

Q. And did he tell you on that date that he had sold out to the Columbia Lumber Company?

A. No, he did mention—can I testify as to hear-say?

(Testimony of E. M. Jacobsen.)

Q. Tell as to what Bruno Agostino told you, because he is a party to the lawsuit. [253]

Mr. Boochever: Not unless Columbia Lumber was there. That is hearsay to the same extent this other was hearsay.

Mr. Bell: I will withdraw it then. I think maybe he is right about it.

Q. You did prepare it about the first of January of 1948, didn't you, wasn't that about when it was prepared?

A. No, it was later than that because I spent a winter in Seattle and I did not return to Cordova until I believe it was the 5th of April, 1948 and I took it up then. It should have been prepared long before but it wasn't.

Q. Had arrangements been made for the extension before that?

A. No, this is the only arrangement that has been made.

Q. In other words, Mr. Jacobsen, what I would like to know, how did you know that you were supposed to grant him the extension?

A. Well, I knew that he needed an extension because he was not finished with the area.

Q. That is right, and there is quite an area of timber uncut yet? A. Yes, that is right.

Q. Now, then, you had received check paying for \$250 for 250,000 feet, had you not?

A. Yes, in a way. We don't collect checks, they go direct to our fiscal agent at Juneau and we are

(Testimony of E. M. Jacobsen.)

notified that the payment we called for has been received down there. [254]

Q. Did you ever see it personally—see that check personally? A. No.

Q. I believe it is stamped with the Juneau—

A. Yes, that is right. No, we don't see those checks ever. It goes directly to the fiscal agent.

Q. Well, these stamps on here indicate that the date that it was paid and so on, doesn't it, on the back? A. Yes.

Q. What do you charge for stumpage—lumber on the stump? A. \$1 a thousand.

Q. \$250 check would be for how much lumber?

A. One quarter of a million feet.

Q. Or 250,000 feet, wouldn't it? A. Yes.

Q. At the first of the year—at the close of the cutting season of 1947, did you get into the mouth of Mosquito Creek or at the Barry Arm camp?

A. Well, I will have to refresh my memory on visit made there. I have it in my pocket, shall I?

Q. Sure, sure, if you have the information there, you see.

The Court: I think we had better take a recess until 3:30.

(Short recess.)

The Court: The record will show all members of the jury are present. Counsel may proceed with the examination. [255]

Q. (By Mr. Bell): Mr. Jacobsen, since refresh-

(Testimony of E. M. Jacobsen.)

ing your memory by your book, would you tell the jury the last date that you visited Barry Arm camp in 1947? A. August 7, 1947.

Q. And what were your dates of visit in 1948?

A. July 21st.

Q. July 21st, 1948? A. Yes, sir.

Q. Now, then, do you know whether or not Bruno Agostino had some unfinished cuttings on his permit before he paid the \$250 for an additional 250,000 feet.

Mr. Boochever: I object to that question as including two questions in one. It assumes that he did secure additional permit there which I understand is incorrect and he has to answer that part and then answer the other part.

Mr. Bell: I will separate it. I did show you the check where he purchased the additional 250,000 board feet.

Mr. Boochever: I object to that; the check doesn't show he purchased any additional 250,000 board feet.

The Court: Well, the jury knows what the testimony is. Overruled, you may answer and if the question is misleading say so.

The witness: The sale that was made—the last sale that was made was in the amount of \$500 of which \$250 were paid in [256] advance. As the cuttings progressed up to that amount, \$250, we called for an additional \$250 on the same sale.

Q. And it was all on the same sale?

(Testimony of E. M. Jacobsen.)

A. Yes.

Q. And it was the last half of the 500,000 board feet of cutting? A. Yes, that is correct.

Q. Now, then, in the fall of the year, 1947 about how many hundred thousand feet, board measure, did the Barry Arm camp crowd have a right to cut yet? A. 250.

Q. Well, was it just 250,000 or was there a little bit left of the first 250,000?

A. Well, that is an estimate and I cannot be too positive. Final scale determines the actual payments and we do have to estimate the timber involved which could vary. We will say there was a quarter of a million or there is a half million and it would vary ten or fifteen or twenty percent either way.

Q. But he did have fully 250,000 feet, board measure, yet to cut there?

A. We expected that, yes, sir.

Further Redirect Examination

By Mr. Boochever:

Q. Now, this in July 12th of 1948, there was a modification and extension of timber agreement grant to Mr. Agostino, is [257] that correct?

A. Yes, sir.

Q. By extension does that mean increasing the size or extension of the—

A. Extension of time for the same area.

Q. In other words, this is the same area that he had been previously granted, is that right?

A. Yes, sir.

(Testimony of E. M. Jacobsen.)

Q. Now, at that time you went out there and saw Mr. Agostino, I believe you testified, is that correct?

A. No, I saw Mr. Agostino in Whittier, that is when the modification was made out.

Q. That is what I meant, sir? A. Yes.

Q. When was that?

A. Well, it was right around July 21st—July 21st I apparently was at Barry Arm. I did not see Mr. Agostino at Barry Arm but I saw him a day before or day after at Whittier.

Q. And you gave him an extension of his right to cut that timber? A. That is right.

Q. Did he say to you to the effect that it should be given to Columbia Lumber, that he had sold his lumber or anything to that effect?

A. No, he did not. I think, however, he did say that he might [258] sell through Columbia Lumber and be clear or some such statement.

Q. And that was on July 21, 1948 or thereabouts?

A. Yes.

Q. Now, you were asked if Columbia Lumber cut timber and the word used was “there” and you answered yes, but that did you mean they cut in their own timber grant?

Mr. Bell: I object to leading his witness; the witness is very intelligent.

The Court: Overruled.

Mr. Bell: Exception.

A. Yes, they cut in their own restricted area.

Q. (By Mr. Boochever): Did you mean by that

(Testimony of E. M. Jacobsen.)

they cut in Agostino——

A. No, I mean in their own restricted area up the creek.

Q. Thank you.

Mr. Boochever: That is all, Your Honor.

The Court: Any further cross-examination?

Further Recross-Examination

By Mr. Bell:

Q. In Whittier at the time that you prepared that paper to Mr. Agostino to sign, did he tell you this or this in substance “My timber has already been cut off by the Columbia Lumber Company—Mr. Morgan” and did you say to him “Well, he had no right to do it; you ought to have him arrested”?

A. No.

Q. Now, you didn't say that to Bruno Agostino?

A. I did not.

Q. And weren't you and Tom Morgan together there—I don't know whether it was Tom Morgan—A Mr. Morgan, when you were talking to Bruno Agostino?

A. No, we were alone sitting out on a lumber pile near the salt water edge.

Q. Of the Columbia Lumber Company camp?

A. While I was trying to induce him to sign. I say “induce him” because I had quite a time persuading him that he had no right there at all unless he signed the agreement and he did make a statement saying “I will sign it for you and for nobody else” and I felt quite flattered about that.

(Testimony of E. M. Jacobsen.)

Q. Why was it, could you understand why he said he didn't want to sign an extension of it?

A. No, I couldn't quite understand that.

Q. Could it be that you forgot that he told you that he had sold it to the Columbia Lumber Company and they had already cut the timber?

A. No, definitely not.

Q. The permit, you feel, was for his benefit or for whose benefit?

A. It was for his benefit. He had no right. He was a trespasser there after January 1st, to be very proper, in the eyes [260] of the Forest Service.

Q. And he had paid, however, the \$250 but the permits had not been given to him or something of that kind?

A. Well, he had used up his period of cutting. He had failed in his contract.

Q. He had to have it renewed for permission to cut there, is that right? A. That is right.

Q. And you knew at the time that his lumber was cut, that all the lumber near the mouth of Mosquito Creek and over the ground that he had any right to cut on that already had been cut at that time? A. No, I did not know that.

Q. I thought you said that you had been to Barry Arm camp and that the lumber had all been cut out except some scattering timber there?

A. No, you greatly are mistaken; I did not say that.

Q. Did you say you went to Barry Arm camp in July 21st? A. Certainly.

(Testimony of E. M. Jacobsen.)

Q. And you came back from there to Whittier, did you? A. Correct.

Q. And that is when you had Bruno sign this?

A. Yes.

Q. Did you sign it at that same time?

A. I signed it at the same time, yes. [261]

Q. You dated it, of course, at the time you signed it? A. Did what?

Q. You dated it at the time you signed it, didn't you? A. Yes.

Q. I will ask you to look at the date on that and tell the jury what that date shows?

A. It shows no date at all.

Q. Can you see that, Mr.—?

A. 10th day of July.

Q. Now, that was dated on the 10th day of July not the 21st at all, wasn't it?

A. Well, I can retrace that very simply. I have said it was a day after or ten days. It might have been ten days after.

Q. You can't remember whether it was one day or ten? A. (No response.)

Q. Then you couldn't hardly remember what Mr. Agostino told you then if you couldn't remember any better date than that, could you?

A. I don't value that an answer.

Q. You couldn't remember any better one thing than you could the other that happened that day, can you? A. Possibly I can.

Q. You are a pretty good friend of Mr. Morgan, aren't you?

(Testimony of E. M. Jacobsen.)

A. I am friends of everybody who wishes to be friends with me. [262]

Q. You have been staying over at the hotel with Mr. Morgan since you have been in town, haven't you?

A. I have seen very little of Mr. Morgan except around the court room.

Q. You were in Mr. Morgan's room when Mr. Ross called you on the 'phone, weren't you?

A. Certainly.

Mr. Bell: That is all.

Further Redirect Examination

By Mr. Boochever:

Q. Mr. Jacobsen, has any attempt been made to intimidate you in regard to this trial?

Mr. Bell: I object to that because that would not be proper, an attempt to intimidate. That is the only question——. He has been on the stand here. He is a man of ability. We object to that.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Have you been in Mr. Bailey's office? A. Yes.

Q. Mr. Bell's? A. Yes.

Q. Did he talk to you at length about this case?

A. We discussed it very little, in fact, I was astonished how well they confided in me. [263]

Q. Did they attempt to get you to testify on this case?

(Testimony of E. M. Jacobsen.)

A. Well, they summoned me here for the purpose of testifying.

Q. And were you willing to appear after you were summoned for them?

A. No, I was not willing to appear.

Q. And why not? A. Because——

Mr. Bell: I object to why; that is a conclusion.

The Court: Overruled.

Mr. Bell: Exception.

A. Because I felt I could do them no good.

Q. (By Mr. Boochever): And have you told the truth on this stand all through your testimony?

A. Every word of it.

Q. And what you remembered you have told and when you didn't remember something you told that, is that right? A. That is right.

Mr. Boochever: That is all, Your Honor.

Further Recross-Examination

By Mr. Bell:

Q. Would you please tell the jury where my office is? A. In the Central Building.

Q. And what room is it? A. 216, I guess.

Q. 216, and that is the room you visited me in, is it? [264]

A. Well, I don't know, let's say that way.

Q. Now, you talked to Mr. Ross just before noon today, didn't you? A. Yes, sir.

Q. And in that conversation did you say this to Mr. Ross or this in substance "Morgan is a

(Testimony of E. M. Jacobsen.)

slicker and trying to beat these men"? Did you say that to Mr. Ross in his office?

A. No, sir, I did not.

Q. Did you say anything about Mr. Morgan to Mr. Ross in his office?

A. I don't think he was mentioned. We were settling the bill.

Q. And did you say anything to Mr. Ross about Mr. Morgan at all?

A. I can't remember, I don't believe I did.

Q. Was the word "slicker" mentioned by you.

A. No.

Mr. Bell: That is all.

Mr. Boochever: That is all.

The Court: That is all.

(Witness excused.)

The Court: Is there any reason to detain Mr. Jacobsen here?

Mr. Boochever: We have none.

Mr. Bell: Not on our part.

The Court: You may be excused permanently. Another witness may be called.

J. F. HOOPER

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

(Testimony of J. F. Hooper.)

A. J. F. Hooper.

Q. Where are you employed now, Mr. Hooper?

A. Columbia Lumber at Barry Arm.

Q. Where are you employed during the fall of 1948?

A. Barry Arm.

Q. What was your occupation during 1948?

A. Boom man.

Q. And when did you first come out to Barry Arm?

A. Around the first of August.

Q. And did you have your wife with you at that time?

A. Yes, I did.

Q. And where did you and your wife live then?

A. We occupied one of the camp buildings at Barry Arm—Bruno's camp.

Q. Bruno's camp, is that right?

A. That is right.

Q. And that was what time you moved in there?

A. Around the first of August as near as I can remember. [266]

Q. And how long about did you stay living on that property?

A. Well, I actually stayed there until the camps were down in the fall.

Q. Now, did you receive any orders at any time from Columbia Lumber to leave that property?

Mr. Bell: Now, I object to that; that is hearsay, purely hearsay.

The Court: Overruled.

Mr. Bell: Exception.

(Testimony of J. F. Hooper.)

Q. (By Mr. Boochever): Would you answer the question, please? A. Yes, I did.

Q. About when was it that you received such order? A. It was the latter part of August.

Q. After you received those instructions did you see the plaintiff here, Mr. Agostino?

A. Yes, I did.

Q. Where was he at the time?

A. He was there at camp.

Q. Was he staying there?

A. He was staying in his cabin, yes.

Q. And did you have any conversation with him in regard to your being at the camp? A. Yes.

Q. What was that conversation? [267]

A. I told Mr. Bruno that I had been notified by the company that I would have to leave the building and I and my wife talked with Mr. Bruno and asked him if we could continue to occupy one of the buildings there.

Q. What did he say?

A. Yes said, yes we could.

Q. Did he ask you to do anything in regard to the buildings

A. Well, he said that if somebody don't stay here the buildings will fall down during the snow and he said "I would be glad to have somebody stay here to look after my cabin" and "I have stuff in it that I don't want to lose there."

Q. And did you stay on? A. I did.

(Testimony of J. F. Hooper.)

Q. Now, during the spring did you see Mr. Jacobsen this year? A. Yes.

Q. And did you tell him why you were staying there at that time? A. Yes.

Q. Now, prior to that time you spoke about seeing Mr. Agostino, had you seen Mr. Agostino there before that in the month of August, 1948?

A. Well, Mr. Agostino was there at the time I got notice that I would have to vacate the house. He was in his cabin then.

Q. And before that day had you seen Mr. Agostino? A. Yes. [268]

Q. Had you talked with him? A. Yes.

Q. And what did you tell him about why you were there then?

A. Well, I told him that I was there because there were no other living quarters available and having my wife with me I must either stay in his camp or I would have no place for her to stay.

Q. And that was before you received quarters—before you received orders to leave the camp, is that right? A. That is right.

Q. Now, after this second conversation with Mr. Agostino did he leave shortly after that?

A. Yes, he did.

Q. And did you stay on? A. Yes.

Q. Do you know whether anyone came and took one of the caterpillar tractors away after that?

Mr. Bell: After when?

(Testimony of J. F. Hooper.)

Mr. Boochever: After Mr. Agostino left.

Mr. Bell: I object to it unless it was in the presence of Agostino or Mr. Agostino took it. What they did with the cat—

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please? [269]

A. Well, I don't quite understand the question.

Q. The question was whether anyone ever came and took any of the cats away?

A. Yes, there was somebody took cats away but not while I was home.

Q. Not while you were home?

A. It was while I was at work.

Q. And did you see someone take a cat away?

A. Well, I saw the boat come in and I saw it go away and the cat was gone when I came home.

Q. About when was that?

A. I didn't keep no account of the date or anything but I should judge it must have been in September as near as I can remember.

Q. And was that Columbia Lumber or any of its men who came and took that cat away?

Mr. Bell: I object to that because he said he didn't know who took it away already.

The Court: Objection sustained.

Q. (By Mr. Boochever): Your Honor, he could not know but he could know whether it was a Columbia Lumber man or a Columbia Lumber boat.

(Testimony of J. F. Hooper.)

The Court: I don't see how he saw the man come in and go out.

Q. (By Mr. Boochever): Do you know if that boat belonged to Columbia Lumber Company?

A. I know it didn't.

Q. Where were the cats at the time this one cat was taken?

A. They were both at Bruno's camp.

Q. Were they in his garage? A. Yes.

Q. Do you know whether the other cat was ever taken away? A. They were both taken.

Q. Do you know whether either of them were taken by Columbia Lumber Company or any of its men?

Mr. Bell: I object to that for the same reason. He states he doesn't know.

The Court: The objection is good as to the first one but not as to the second.

Q. (By Mr. Boochever): With regard to the second one, do you know whether it was taken by a Columbia Lumber man or any of its employees?

A. It was not.

Q. Now the rest of Agostino's equipment there, was that left back in his cabin in his garage and cabin after you received orders to leave the premises?

Mr. Bell: I object to it as leading and suggestive.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Now, do you know

(Testimony of J. F. Hooper.)

whether any of the other Columbia Lumber men occupied those premises after September 1st?

A. No, they did not.

Q. Did they use any of Agostino's property after that date?

Mr. Bell: I object to that for the reason that there is no contention that Agostino has any property there.

The Court: The objection is sustained.

Q. (By Mr. Boochever): Did they use any of the property which was known as Agostino and Socha's property, which is under dispute in this case as alleged to have been sold to the Columbia Lumber Company?

Mr. Bell: I object to that as calling for a conclusion of the witness and for the further reason it is leading and suggestive and there is no contention that Agostino and Socha had any property there.

The Court: Overruled. He may answer.

Q. (By Mr. Boochever): Would you answer the question?

The Court: I don't know what date?

Mr. Boochever: It was after he received orders on or about the end of August, early in September, from September 1st on.

The Court: You can tell what you know about the property and whether any of it was left and if so who took it.

A. Well, the property—the cats and a certain

(Testimony of J. F. Hooper.)

amount of [272] equipment—which, of course, I am not familiar with—what was there when I came, because the company had taken away the cats and was working on them at the time I came.

Q. (By Mr. Boochever): By that you mean they were repairing them?

Mr. Bell: I object to leading the witness.

The Court: Yes, your side complained quite often about the leading questions and evidently they are adopting the same theory.

Mr. Boochever: Very well, Your Honor.

Q. What do you mean by “working on them”?

A. Well, they had mechanics to repair the cats. They were intending to use them for logging purposes and they had taken them over to their shop there where they could work on them before I came so I don't know what was there before I came.

Q. Then after you came and after you received the order to leave the property what was done about the equipment?

A. Well, the equipment was returned back to Agostino's camp.

Mr. Boochever: That is all, Your Honor.

Cross-Examination

By Mr. Bell:

Q. Now, that was what date was it that you saw Agostino down there?

A. I can't give a definite date but as near as I can remember it was the latter part of August.

Q. How did he come? [273]

(Testimony of J. F. Hooper.)

A. He came in a 'plane.

Q. And how long did he stay?

A. As near as I can remember a week or ten days.

Q. A week or ten days?

A. He was there several days.

Q. And where did he stay?

A. He stayed in his cabin.

Q. In a little cabin off to itself, is it?

A. Yes.

Q. Off to one side? A. That is right.

Q. And that is the only time you ever saw Bruno Agostino, is it? A. Oh, no.

Q. I hand you Plaintiffs' Identification 32 and ask you to state if you have ever seen that before?

A. Yes.

Q. Who wrote that, if you know?

A. Well, I don't know who wrote it,—Yes, I wrote that.

Q. You wrote that yourself? A. Yes.

Mr. Bell: We now offer this in evidence.

Mr. Boochever: No objection.

The Court: It may be admitted as Plaintiffs' Exhibit No. 32. It may be read to the jury. [274]

Mr. Bell: "Mr. and Mrs. J. F. Hooper occupying this house by permission of the Columbia Lumber Company, August 30, 1948. Witness."

You may see it if you care to.

Q. When did you first start occupying that house?

(Testimony of J. F. Hooper.)

A. Well, I don't remember the exact date, but it was near somewheres around in the first part of the month of August.

Q. When did you first go to work for the Columbia Lumber Company?

A. I have been employed by them for two years.

Q. When did you first go to Barry Arm camp?

A. Around the first of August as near as I remember.

Q. Where were you immediately prior to going there? A. Whittier.

Q. What were you doing at Whittier?

A. I was boom man at Whittier at the mill.

Q. And when you quit at Whittier you went directly to Barry Arm camp, did you?

A. I didn't quit at Whittier.

Q. You were transferred? You finished working there and went to Barry Arm camp, didn't you?

A. That is right.

Q. How long did you stay at Barry Arm camp?

A. I have been there ever since.

Q. And you are still there? [275]

A. Where?

Q. At Barry Arm camp?

A. That is right.

Q. Where are you living now?

A. I am living in the same place at the present time that I was when I came there.

Q. That is what is called the Barry Arm camp house that you referred to as Agostino's house?

(Testimony of J. F. Hooper.)

A. That is right.

Q. Now, how many times did you see Agostino in August of 1948?

A. Well, I saw him several times because he was there for several days.

Q. Did you ever talk to him any more than once?

A. Oh, yes.

Q. Was he in your house at the time you wrote that paper? A. That is right.

Q. And you are still there now?

A. Yes, sir.

Q. In what capacity are you staying there now?

A. Only permission of Mr. Bruno.

Q. What are you doing there in the valley at Barry Arm camp?

A. I work over at the Columbia Lumber.

Q. You work for the Columbia Lumber Company yet? A. Yes. [276]

Q. And in what capacity do you work?

A. As boom man.

Q. Are you cutting timber there now?

A. No, I don't cut no timber.

Q. Are the Columbia Lumber Company people cutting timber there now? A. I presume so.

Q. Were they there cutting timber when you left there? A. That is right.

Q. What day did you leave there?

A. Monday, I guess it was.

Q. Monday of this week? A. Yes.

Q. And how far up Mosquito Creek are they

(Testimony of J. F. Hooper.)

cutting now?

A. I don't know, I haven't been up there.

Q. I believe you stated that you got notice from the Columbia Lumber Company to move out of that house?

A. I did.

Q. Was that in writing or oral?

A. That was through the foreman of the camp.

Q. Through the what?

A. Through the foreman of the Columbia Lumber camp.

Q. And he told you that? A. Yes.

Q. Did he give you anything in writing? [277]

A. No.

Q. And you didn't move out?

A. Well, I prepared to move out.

Q. And you are still living there now?

A. But at that time Mr. Bruno was there so I and my wife talked to him and made arrangements to stay there.

Q. Was that before you gave him this paper?

A. No, that was given the paper before that—before I got the notice of the return from the company.

Q. Did you get anything in writing to show that?

A. I did not. They never give me anything in writing.

Q. I mean, did Mr. Agostino give you anything in writing? A. No.

Q. And he asked you to give him something in

(Testimony of J. F. Hooper.)

writing but you didn't ask him for anything back, is that right? A. No, that is right.

Mr. Bell: That is all.

The Court: That is all, sir.

Mr. Davis: Just one minute.

Mr. Boochever: That is all, Your Honor.

The Court: Jurors have the right to ask questions. I forgot to remind them before. If you want to ask questions at any time just so indicate.

(Witness excused.)

EDWARD F. McALLISTER

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. Edward F. McAllister.

Q. Where were you in the spring of 1948?

A. I came to Barry Arm camp on the 15th of April.

Q. How did you happen to come there?

A. I hired out to Blacky Lambert of Seattle.

Q. And did Mr. Lambert hire you?

A. That is right.

Q. In what capacity were you hired?

A. I went up to do the climbing and the hooking.

Q. Where did you go at that time—where did you go to work for Mr. Lambert?

(Testimony of Edward F. McAllister.)

A. I went to work at the camp at Barry Arm.

Q. Are you familiar with the camp of Mr. Agostino that is claimed by Mr. Agostino and Mr. Socha?

A. I know where Bruno's camp is, yes.

Q. Did you live there or not?

A. No, we lived in the Barry Arm camp.

Q. Whose camp was that, was that Lambert's camp?

A. I suppose it was Lambert's camp. That is the man I was working for. [279]

Q. Where was that located in relation to Bruno Agostino's camp?

A. That would be about, I guess, in the neighborhood of 1500 or 2,000 feet from Bruno's camp up the creek.

Q. And at the time you arrived when was that?

A. I went to work on the 17th of April.

Q. And at that time how many men were working there?

A. There was—I believe there was eight men working when I arrived there.

Q. Whose employees were those men?

A. Well, as I understand it, Mr. Lambert's.

Q. Were there any, to your knowledge, Columbia Lumber employees there?

A. Not that I know of. I understood everybody was working for Blacky Lambert.

Q. Now, at that time were you using any of Mr. Agostino's equipment or his property?

A. Not that I know of.

(Testimony of Edward F. McAllister.)

Q. Was Mr. Agostino around the camp at that time?

A. Well, he was there shortly after I was there, I know that, he was there for three or four weeks.

Q. And where was he living at the time?

A. He lived in his own camp.

Q. Now, what was your job there?

A. Well, I was hooking and climbing. [280]

Q. Is that connected with cutting timber?

A. No, that is rigging up and yarding.

Q. And are you familiar with the timber that was cut there by Columbia Lumber Company?

A. I know the timber that was cut, yes.

Q. Where did they start cutting with regard to the timber Bruno Agostino had cut off previously?

A. Bruno's last setting—I believe Lambert's first setting would be a thousand or fifteen hundred feet upstream from where Bruno had logged. I am not positive exactly but it would be in that neighborhood.

Q. Approximately how many feet of timber were between where Lambert started logging and Agostino stopped logging, if you can estimate?

A. I wouldn't estimate that. There is scattered patches in there. As far as being commercial timber, I don't know, there is quite a patch in there.

Q. So far as you know did Lambert log any of Bruno's timber? A. Not that I know of.

Q. Around in April you said Bruno came, about how long did he stay to the best of your remembrance?

(Testimony of Edward F. McAllister.)

A. I think he was there for three or four weeks.

Q. Then did he leave?

A. Yes, I believe he left.

Q. And about when did he come back? [281]

A. Well, I don't know. He was in there twice to my knowledge last summer. He must have been there once sometime in June.

Q. At that time were any of Lambert's men or any of Columbia Lumber Company's employees living on Bruno's property or using his equipment? A. Not that I know of, no.

Q. Now, subsequently in the Month of July—during the month of June was any of his property used or any of his equipment used to your knowledge by any of Lambert's men or Columbia Lumber's? A. Not that I know of.

Q. During the month of July was there a change in that? A. Well, yes.

Q. About when, do you know?

A. Well, it would be after the 4th, probably in the range of ten days or two weeks beyond the 4th there was a difference.

Q. Did you receive any instructions or anything of that nature at that time?

Mr. Bell: I object to any instructions. That is purely a conversation with some person in the absence of the plaintiff.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Was there a change and who was your employer about that time?

(Testimony of Edward F. McAllister.)

A. Well, Lambert had left and Earl Proud came up to run the [282] camp.

Q. And did Proud have any—I will withdraw that question. Now, after that time, you say, about two weeks after July 4th was there a change of policy with regard to using this Socha-Bruno's equipment there?

A. I don't know anything about any policy or any agreements; at that time the other two cats showed up there.

Q. They were brought over to the Columbia Lumber's camp, is that right?

A. They got them over there at that time, that is correct.

Q. Do you know how they got over there?

A. Well, they were—one of them was driven over there and I guess the other one was drug over, I don't know, they got there anyway.

Q. Do you know what the condition of those cats were at that time?

Mr. Bell: It is not shown that he is capable of determining what the condition of machinery is. I object to the question.

The Court: Are you a mechanic, sir?

The Witness: No, I am not a mechanic. I am very familiar with logging machinery.

The Court: All right, you may answer.

Q. (By Mr. Boochever): Do you know what the condition was of those caterpillar tractors at that time? [283]

(Testimony of Edward F. McAllister.)

A. They were not in shape to log.

Mr. Bell: I move to strike the answer as not responsive to the question.

The Court: The motion is denied.

Q. (By Mr. Boochever): Now, you say they were not in condition to log? A. No.

Q. What, if anything, was done with these tractors at that time?

A. Well, I don't know what all was done but there were two men working on them there and there was a lot of parts bought and some of those parts are laying there yet to repair those cats with.

Q. And were those cats repaired?

A. There was work done on them. They were never fully repaired.

Q. Were they ever used by your crew or Mr. Proud's crew or Columbia Lumber's in logging operations?

A. Not in the logging operation I wouldn't say, no, the small cat was used to haul supplies from the beach and haul over parts to fix the big cat. As far as logging I don't think either cat ever hauled a log.

Q. Now, subsequently, did you receive any orders from Columbia Lumber Company in regard to those cats at all? A. I received,— [284]

Mr. Bell: I object to that because the orders if in writing would be the best evidence and oral orders would only be conversation.

(Testimony of Edward F. McAllister.)

The Court: Objection is sustained. You may tell what was done with the cats.

Q. (By Mr. Boochever): What was done with the cats after that?

A. Well, they were taken back to Bruno's.

Q. About when was that, do you remember, about the time?

A. I don't have any idea of the date. I should judge the cats were there about three weeks.

Q. And were returned to Bruno's property?

A. I heard that everything was to go back to Bruno's and the next day we came in and the cats were gone. They were back there.

Q. When the cats were taken back were you still logging there? A. Yes, we were logging.

Q. And did you continue to log after that?

A. Yes.

Q. Now, after the time that the cats were returned there, did any of the men who were working with you there or to your knowledge any of Columbia Lumber's employees ever use any of Bruno's equipment?

Mr. Bell: Now, I object to that unless he knows what was Bruno's equipment. [285]

The Court: Well, he has asked for his knowledge. Just tell what you know?

A. To the best of my knowledge when those cats were taken back I believe that anything that was there that belonged to Bruno was taken back. That is the best of my knowledge. I don't know every

(Testimony of Edward F. McAllister.)

nut and bolt that Bruno owned but as far as I know everything was taken back.

Q. (By Mr. Boochever): And after that was anything used of Bruno's?

Mr. Bell: I object to that for the same reason.

The Court: Objection is overruled.

A. No, there was nothing used of Bruno's that I know of.

Q. (By Mr. Boochever): Now, have you been engaged in logging operations for a long time?

A. Yes, for about 22 years.

Q. Are you familiar with the values of logging equipment? A. Not a cat, I am not, no.

Q. How about a donkey or a hoist?

A. Well, that is a different proposition.

Q. Do you know the donkey or hoist which was there on Bruno's property during the summer of 1948, are you familiar with it?

A. I have seen it, yes.

Q. Was that a good donkey or hoist?

Mr. Bell: I object to that as purely a conclusion. [286]

The Court: Overruled.

A. That was not a logging donkey.

Q. (By Mr. Boochever): It was not a logging donkey? A. No.

Q. What was its condition?

A. I didn't go over it very closely, all I noticed about it, it had a twisted shaft. Outside of that I couldn't tell you anything about it.

(Testimony of Edward F. McAllister.)

Q. Do you have any idea of whether it had any value at all? A. Certainly it had a value.

Q. Approximately what value would it have?

Mr. Bell: I object to that unless it is shown that he knows values at that place.

The Court: Objection is sustained.

Mr. Boochever: I believe I asked him if he was familiar with the values of logging equipment, Your Honor. I will repeat the question.

Q. Are you familiar with the values of logging equipment?

A. As far as donkeys are concerned, I think so.

Q. What would you estimate the value of that donkey as it stood there at that time?

A. The value I don't know. If I was to buy it I wouldn't give over \$3,000 for the machine as it stood there.

Q. Did Columbia Lumber Company or did Lambert or any of his men use that donkey at all? [287]

A. No.

Q. Did they take it away and do anything with it? A. No.

Q. In other words it just stayed there all the time?

A. It was never touched; it sat on the beach all summer.

Mr. Boochever: That is all, Your Honor.

The Court: Court will stand in recess until 18 minutes past four.

(Short recess.)

(Testimony of Edward F. McAllister.)

Mr. Boochever: Your Honor, may I have permission to ask this witness one more question?

The Court: Counsel may proceed.

Q. (By Mr. Boochever): Referring to the donkey again, did that donkey have any value for a logging outfit—an outfit interested in logging?

Mr. Bell: I object to that. He has already fixed the value in his opinion.

The Court: Overruled.

Mr. Bell: Exception.

A. Practically, I would not use it for a logging machine.

Q. (By Mr. Boochever): You testified that the equipment was all returned to Agostino property, after that to your knowledge was that donkey ever taken away?

A. You are talking about Bruno's donkey?

Q. That is right? [288]

A. I can't state that as a fact, however——

Mr. Bell: I object to him stating something that he said that he didn't know to be a fact.

The Court: Do you know whether the donkey disappeared or not?

The Witness: Absolutely the donkey disappeared but I saw nobody take it.

Q. (By Mr. Boochever): When did that happen, approximately?

A. I believe that is in the early part of September.

Q. Did the donkey sled disappear at the same time? A. The whole works was gone.

(Testimony of Edward F. McAllister.)

Mr. Boochever: That is all.

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. Bell:

Q. Mr. McAllister, when did you start working in the timber woods?

A. I started along about 1927, something like that, in B.C.

Q. In British Columbia?

A. That is right.

Q. How long did you work over in British Columbia?

A. Oh, I worked there about two years.

Q. Then after you left there where did you go?

A. I worked in Washington.

Q. Washington State? [289]

A. That is right.

Q. And how long did you work there?

A. Well, for quite a number of years up until I went to Oregon about four years ago.

Q. And then you worked in Oregon from that time on up to the time you came to Alaska?

A. I worked back and forth in Oregon and Washington.

Q. Where did you work in Oregon?

A. Well, I worked for the Saganaw Timber Company at Valsatch, Oregon. I worked for Werner Brothers at Taft, Oregon.

Q. Did you always work at the same line of work that you have described here?

(Testimony of Edward F. McAllister.)

A. I have been a high climber for many years.

Q. A high climber? A. Yes.

Q. Will you explain to the jury what that means?

A. Well, a climber is a man that tops the trees and goes up and rigs them and generally rigs the donkeys, rigs them up ready to move the logs. You have more or less the construction of the unit to start logging with and after that you go after it until it is finished.

Q. You say you cut the top out?

A. Cut the top out.

Q. That has been your business practically all your life, has it? [290] A. That is right.

Q. You were never an engineer?

A. I have handled the job at different times. I don't follow it.

Q. You are not a licensed engineer, are you?

A. No.

Q. And I believe you stated you were not a mechanic? A. No, I am not a mechanic.

Q. Could you tell the jury what kind of caterpillars that you are talking about that you referred to as Bruno's cats?

A. Well, Bruno's cats was the big 8 cat and the small 7, one is a Caterpillar and the other is either an International or cat, I believe it is an International.

Q. Would you tell the size of it, please, what designated it?

(Testimony of Edward F. McAllister.)

A. One is a 7 and one is a D-8, that is the common trade name.

Q. Is there any difference between an R.D. 8 and R.D. 7 and a D-8 and D-7?

A. I understand the D.R. was the same as a D-8 and a D-8 cat is larger than a D-7.

Q. These were both rather large cats, were they?

A. One of them was a standard logging cat for size. The other one was a small cat.

Q. Well, now, which was the standard logging size?

A. The D-8.

Q. Now, who owned the equipment that you operated there? [291]

A. Columbia Lumber Company.

Q. Now, did they have any D-8 cats there?

A. They have a D-7.

Q. That is what you say is not fitted for logging operations?

A. Well, it is fitted for that particular place but it is not a standard logging cat; it is generally a size larger.

Q. Is that the only cat they had there?

A. At that time they had one 7.

Q. Do you have any other there now?

A. They have two 7's there now.

Q. Are they old cats or new?

A. They are—I believe one has 1500 hours on it and the other has 1100 running hours.

Q. Since they were brought there?

A. Since they were bought.

(Testimony of Edward F. McAllister.)

Q. What year models, are they?

A. I presume they would be last year models, that is, the year before this last one we are speaking of. It would be 1947.

Q. 1947, you think? A. I think so.

Q. You don't think they are '37's?

A. No, absolutely not.

Q. Now, when you went there Blacky Lambert was in charge, was he? A. That is right. [292]

Q. And the same equipment is there now that was there when Blacky was there?

A. There is an extra cat there now.

Q. When did that one come in.

A. About a month ago.

Q. Now, what do you understand to be the equipment that formerly belonged to Bruno Agostino or the Barry Arm Camp?

A. Well, as I understand Bruno's equipment was the D-8 cat and the 7 cat and this donkey he was speaking of. That is all that I know of the logging equipment that he had there.

Q. That is the only things you referred to as Bruno's? A. That is right.

Q. And that is all you know that you meant when you said Bruno's equipment?

A. That is the logging equipment; that is all I know about.

Q. The saw mill is still there?

A. It is still there.

Q. Now, this one-thousand feet between where

(Testimony of Edward F. McAllister.)

Bruno had quit cutting and where Lambert started cutting, that was grass land, was it not?

A. If you ask me, the whole works is grass land but there is scattered timber in there and there are scattered patches, and you go through the timber and you come to muskeg again.

Q. Then about a thousand feet up from there the heavy timber sets in, does it, the better timber?

A. No.

Q. It doesn't? A. No.

Q. Where does it set in?

A. The heavy timber? There is no heavy timber there until you get way up the valley about two miles.

Q. And you haven't got that far in your cutting yet? A. No.

Q. Then when you said that there was about a thousand feet between where Blacky started cutting and where Bruno quit cutting you referred to that period of grass in there?

A. There is timber—what you call timber—there is some trees in there.

Q. How large are they?

A. They are anywhere from probably 8-inches on the stump to maybe a foot and one-half.

Q. And they haven't been cut? A. No.

Q. They are scattered, I believe you stated?

A. That is scattered, yes.

Q. You don't know where the line was of Bruno's

(Testimony of Edward F. McAllister.)

250,000 board feet that he had bought in there, do you?
A. No, I do not.

Q. Now, the parts that were ordered for those cats that you have testified about, do you know whether or not when they came [294] they were not for the proper cats—for those cats?

A. There are parts there now for the small 7 cat that belonged to Bruno and that is the only cat that they will fit. They won't fit anything that the Columbia Lumber has got or anybody else has got.

Q. Were they once put on that cat?

A. No, they hadn't been put on; they had been bought for to put on.

Q. Did you have anything to do with bringing them up from the beach up to that place?

A. No.

Q. Now, weren't those parts for a D-7 and not a R.D. 7?

A. They were—I don't know whether you would call it an R.D. 7, it is a D-7 cat.

Q. You don't know whether those parts will fit it or not?

A. Those pins that are there and those links will fit.

Q. Who furnished the arches that were on those cats?
A. There were no arches.

Q. Were there ever any arches on any of the cats?

A. There was an arch on the Columbia cat.

Q. And that is the only one, you are sure?

(Testimony of Edward F. McAllister.)

A. That is right.

Q. And whose arch was that?

A. I guess that was Columbia's, it came up with Columbia's cat. [295]

Q. You are equally sure that there were no arches on any of the Bruno Agostino cats under any circumstances?

A. There were no arches there.

Q. You are sure of that?

A. I am positive.

Q. Did you ever see those cats run or even one of them run? A. I saw the 7 run, yes.

Q. What date did you see it run and where?

A. I can't give you any specific dates about that. It was in the neighborhood of, I would say, between the 5th or the 7th of July and maybe it was the 15th or the 20th.

Q. And how many days did you see it operating?

A. Well, I saw it running at two different times at different days.

Q. Now, where did you see it running; where were you when you saw it running?

A. I was coming in the camp.

Q. Had you been out in the timber woods that day. A. I was out every day.

Q. So what happened during the daytime ordinarily you wouldn't see, of course?

A. Not around camp, no.

Q. Would you know a picture by looking at the picture—would you know the difference between

(Testimony of Edward F. McAllister.)

the Columbia cat—original Columbia cat that they had down there in July, 1948, and the [296] Agostino or the Barry Arm Company camp cats?

A. Yes.

Q. You would know the difference from a picture? A. Yes.

Q. Will you look at that picture and tell me if that has—what do you call it on the front—an arch, does that have an arch?

A. Yes, there is an arch in that picture but it is not on that cat.

Q. Well, where is it, what is it on?

A. It is sitting there by itself. It is not on anything.

Q. It is just directly behind or in front or something that makes it look like it is on the cat?

A. It is in front of the small D-7.

Q. And which one of those is the Agostino cat that you refer to? A. This one here.

Q. Now, what is this cat, what is this?

A. That is an arch. That is not a cat.

Q. That is an arch and does that belong to the Columbia Lumber Company? A. Yes.

Mr. Davis: Your Honor, I might suggest that counsel identify the pictures that he is talking about.

Mr. Bell: It is Plaintiff's Exhibit 28. [297]

The Court: When you say "here" on there you might say the right side or the left side of the picture or something of that kind to identify or hold it up before the jury so that they can see it.

(Testimony of Edward F. McAllister.)

The Witness: All right, Your Honor.

The Court: Otherwise, the testimony is entirely useless.

Q. (By Mr. Bell): I hand you Plaintiff's Exhibit Identification 27 and ask you to state if you see—what do you call it—an arch in that one?

A. This picture, there is an arch in it and it is out ahead of the cat.

Q. Now, which side of the picture is the arch in?

A. Well, the arch is on this side—right hand side.

Q. Now, how do they connect with the cat?

The Court: Which is the arch?

The Witness: This is the arch here and this here is where you couple onto the arch if you are going to haul it or log with it. You cannot attach on up here, that is the blade end, and this is the coupling end.

Q. (By Mr. Bell): And that cat is one you would refer to as Bruno's that one which is Plaintiffs' Exhibit No. 27? A. Yes.

Q. And this one is the D-7? [298]

A. I think that is the D-7.

Q. Do you recognize the place where the D-7 is setting? A. No, I don't.

Q. Do you recognize the place where the D-8 is sitting? A. The exact spot, no, I don't.

Mr. Bell: That is all.

Mr. Boochever: Mr. McAllister, I have one or two more questions.

(Testimony of Edward F. McAllister.)

Redirect Examination

By Mr. Boochever:

Q. Now you mentioned there are two D-7's there now at Columbia Lumber camp now, is that right?

A. That is right.

Q. What vintage are they, what year were they made, what year?

A. They would be 1947 cats, possibly early 1948.

Q. What model were the cats of Bruno's, if you know?

A. That I can't tell you the model, but they were quite a bit older cats. They were four or five years older than those cats.

Q. Now, Mr. Bell asked you about the sawmill, was the sawmill used by Lambert's men?

A. No.

Q. Has it always remained just the way it was when Bruno had it there, to your knowledge? [299]

A. It was just the way as it was when I came there.

Q. Is the sawmill set up for cutting logs and working? A. No.

Q. Now, I would like to show you a sketch here which was made by another witness. Mr. Jacobsen, and ask you if you can tell what this sketch purports to be? The record should show, I guess, that I am showing the witness Defendant's Exhibit F.

A. Well, this is Bruno's camp down here. This is the Columbia Lumber Company camp.

(Testimony of Edward F. McAllister.)

Q. Is that where it is labeled Columbia Lumber camp on the sketch? A. Yes.

Q. Could you show on this sketch approximately where you started cutting timber or would you not be able to do that?

A. It would be over in this district here.

Q. Would you show that to the jury?

A. It would be well, I should judge, up in here some place.

Q. It is hard for you to judge distance, I guess, on the map?

A. That don't quite show the country very good.

Q. About how far above where the last cutting of Bruno's was that?

A. I should judge that would be in the neighborhood of 1,000-1,200 feet.

Q. Now, Mr. Bell brought out that you would go up in the woods every day and you wouldn't be able to see what was going on [300] around camp quite naturally while you were up in the woods, would you be able to know or see if that cat were used in the logging operation—if Bruno's cats were used?

A. In order for them to be used in the logging it would have to be up to where we were logging when they cold-decked this and swung it with the cats.

Q. Were they there?

A. I did not see them.

Mr. Boochever: No further questions. Your Honor.

(Testimony of Edward F. McAllister.)

The Court: Any further cross-examination?

Mr. Bell: No cross-examination.

The Court: That is all, Mr. McAllister, you may step down. Another witness may be called.

(Witness excused.)

Mr. Davis: Your Honor, our next witness will be a rather lengthy one. Does Your Honor wish us to start now?

The Court: I think we ought to make use of every minute we can.

Mr. Boochever: Very well. One other thing, if the counsel for the plaintiffs have no objection would it be permissible for the last two witnesses to be excused from further appearance so that they can get back to work?

Mr. Bell: As far as we are concerned that is all right.

The Court: Very well, Mr. McAllister and Mr. Hooper then may be excused from further attendance with the consent of [301] counsel for both parties.

Mr. Boochever: Mr. Morgan, will you step forward?